CONVICTING THE INNOCENT

- A triple failure of the justice system

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This essay is based on a paper presented at the Heads of Prosecution Agencies in the Commonwealth Conference at Darwin, Australia on May 7, 2003, and to the Heads of Legal Aid Plans in Canada on August 25, 2003. Following these presentations, counsel from England, Australia, New Zealand, Ireland, Northern Ireland, Scotland, Hong Kong and the United States, as well as Canadian provinces, provided me with a number of helpful comments. I have benefited greatly from this advice. In the result, of course, I alone am responsible for the views expressed in this essay.

Table of Contents

Part I: Defining the Issue 1

Part II: International Reviews During the Past Century 2

a) *American Prison Congress Review (1912)* 2

b) *U.S. State Department Document (1912)* 3

c) *Borchard Study (1932)* 5

d) Franks' Study (1957) 7

e) Du Cann Study (1960) 9

f) Radin Study (1964) 11

g) Brandon and Davies Study (1973) 11

h) Royal Commissions in Australia and New Zealand During the 1980s 12

i) IRA Bombings in Britain (1980s) 16

- *Guildford Four* 17
- *Birmingham Six* 18
- *McGuire Seven* 19
- *Judith Ward* 20
- *Conclusions* 21

j) Commissions of Inquiry in Canada 22

- *Donald Marshall Jr.* 22
- *Guy Paul Morin* 25
- *Thomas Sophonow* 30

k) The United States of America: Wrongful Executions, Not Just Wrongful Convictions 35

Part III: Causes of Wrongful Convictions, and How to Avoid Them 40

1) Predisposing Circumstances 40

a) *Public Pressure* 41

b) The Unpopular Defendant 43

c) Conversion of the Adversarial Process Into a Game 45

d) Noble Cause Corruption 46

e) Recommendations: Reshaping Attitudes, Practices and Culture within the Criminal Justice System 47

2) Immediate Causes 50

a) Eyewitness Misidentification 50

b) Police Mishandling of the Investigation 57

c) Inadequate Disclosure by the Prosecution 60

d) Unreliable Scientific Evidence 63

e) *Criminals as Witnesses* 69

f) *Inadequate Defence Work* 75

g) *False Confessions* 78

h) Misleading Circumstantial Evidence 85

Part IV: Post Exoneration Reviews 90

Part V: Where Do We Go From Here? 93

CONVICTING THE INNOCENT

Part I: Defining the Issue

For centuries, the criminal justice system has developed, relied upon and incrementally refined a body of rules and procedures to ensure guilty persons, charged with a criminal offence are convicted, and the innocent are acquitted.[1] The burden of proof on the Crown – proof beyond a reasonable doubt – is the highest known to the law. Additionally, the presumption of innocence, and the rules on hearsay and character evidence, the right to disclosure of the prosecution's case, and the entitlement to be tried by one's peers are all intended to safeguard the accused against wrongful convictions.

For the most part, these rules have served us well. Too well, perhaps. In the early part of the 20th century, it was thought that the justice system was virtually infallible.[2] A jury's verdict was absolutely sacred. "Our [legal] procedure has always been haunted by the ghost of the innocent man convicted," wrote Judge Learned Hand, a respected member of the judiciary, in 1923. "It is an unreal dream."[3]

Unfortunately, Judge Hand was mistaken. Over the years, a significant number of innocent men and women have been convicted and, frighteningly, some have been

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[1] Law Reform Commission of Canada, *Criminal Procedure: Discovery*, Working Paper # 4 (Ottawa: 1974), esp. at pages 5 – 7 and page 13; *R v Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), at page 388 *et seq*; *R v Howard* (1989), 48 C.C.C. (3d) 38 (S.C.C.), at pages 52-3, and 55-6; *R v Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.), par. 36.

[2] The infallibility of the justice system was a constant theme in early commentaries: Edwin M. Borchard, *Convicting the Innocent* (New York: Garden City Publishing Company, Inc., 1932), at page v; Hugo Adam Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987), 40 Stanford Law Review 21 at page 23 and footnote 18; Keith A. Findley, *Learning From Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 Cal. W. L. Rev. 333 (2002) at page 334 - 5; David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. Ill. U. L. Rev. 91 (2000) at footnote 445 and accompanying text; Arye Rattner, *Convicted But Innocent: Wrongful Conviction and the Criminal Justice System*, 12 Law Hum. Behaviour 283 (1988), at pages 283-4. Editorial, "Restoring Confidence in the Criminal Justice System", 86 *Judicature* 64 (2002).

[3] *U.S. vs Garsson*, 291 F.646, 649 (S.D.N.Y., 1923). Judge Hand was born in 1872, and admitted to the New York Bar in 1897. During his life, he was honored with seven doctorate degrees, including those from Yale, Harvard and Princeton. He was appointed to the Federal Bench in 1909 and rose to become Chief Judge of the Court of Appeal for the second circuit. He wrote over 2,000 judgments during his career, many of which were quoted with approval by the United States Supreme Court.

wrongfully executed.[4] As long as decisions about guilt or innocence remain in human hands – as inevitably they must – wrongful convictions will continue to occur. Realistically, therefore, the challenge to those involved in the criminal justice system is to *minimize* the number of miscarriages of justice that occur.

To begin, I will provide some historical context to the issue, with particular emphasis on the studies that have been done during the past 90 years in Canada, England and the United States, with some commentary on the situation in Australia and New Zealand. An exploration of the sources of wrongful convictions follows a consideration of the extent to which causal patterns can be said to emerge from the existing research. I will conclude with a series of practical recommendations on how, in my view, wrongful convictions can be avoided in the future.

Part II: International Reviews During the Past Century

A significant number of studies on wrongful convictions have been done during the past century. They were undertaken in a wide variety of circumstances, with differing driving forces behind them. Some were privately commissioned; others were mandated by government. Some focused on a single case; others examined a group of unconnected cases. Many were done by scholars employed in universities, although a number were prepared by sitting or retired members of the judiciary. These studies occurred in distinctly diverse legal, political and social environments in Canada, the United States, Britain, Australia and New Zealand.

Before reviewing the principal studies, I believe it is important to underscore two points. First, despite the diversity that I have just described, the patterns and trends that emerge from these studies are both chilling and disconcerting. Second, despite a slow start in the recognition that a problem even exists, Anglo-based criminal justice systems, confronted with the power of scientific developments such as DNA, are now having to grapple with the stark *reality*, and not merely a *belief*, that wrongful convictions have occurred on a significant scale.

a) American Prison Congress Review (1912)

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[4] Perhaps the best known example involves the case of Timothy John Evans. Executed in 1950, the British Government granted him a posthumous pardon in 1966 after it had become abundantly clear that he was innocent of the murders for which he had been convicted. His case was the subject of a book (*Ten Rillington Place* by L. Kennedy, 1961) as well as a movie that was released in 1971, also called *Ten Rillington Place*. (Directed by Richard Fleischer, starring Richard Attenborough).

The earliest attempt to identify cases in which innocent persons were executed was conducted in 1912 by the American Prison Congress.[5] The mandate of the congress was to "carefully investigate every reported case of unjust conviction and try to discover if the death penalty has ever been inflicted upon an unjust man."[6] After a year of review, it concluded that no such cases existed.

To describe this review as a "study" is a bit charitable; and it was certainly not analytical in nature. The methodology simply involved sending a letter of enquiry to the warden in each prison in Canada and the United States, asking whether he had personal knowledge of any wrongful executions. The congress did not report the response rate, but all responses received were in the negative.[7] The sole exception was the response from the warden at Fort Leavenworth, Kansas. He advised that "one or two (persons)...may, in my opinion, have been executed wrongfully."[8]

This review lent support to the prevailing view at that time: miscarriages of justice rarely occur (at least in cases involving the death penalty). Where they do occur, they are remedied through normal judicial or executive procedures before the execution actually takes place.[9]

b) U.S. State Department Document (1912)

In 1912, Edwin M. Borchard, then a young Law Librarian of Congress, wrote an article entitled *State Indemnity for Errors of Criminal Justice*. Accompanied by an editorial preface by John H. Wigmore, then Dean of the Northwestern University School of Law, Borchard's article was published by the United States Government at Washington, D.C. and forms a permanent Senate document in the United States.[10]

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[5] R.H. Gault, *Find No Unjust Hangings, 3 J. Am. Inst. Crim. L. and Criminology* 131 (1912-13).

[6] *Ibid.* at page 131.

[7] *Ibid.*

[8] *Ibid.*

[9] Carolyn Strange, *Comment: "Capital Case Procedure Manual"*, (1999), 41 C.L.Q. 184

[10] *State Indemnity for Errors of Criminal Justice*, by Edwin M. Borchard, Law Librarian of Congress, with an editorial preface by John H. Wigmore, Dean, Northwestern University School of Law, to accompany the Bill (section 7675) to grant relief to persons erroneously convicted in courts of the United States, (Washington: Government printing office, 1912). I wish to thank the U.S. Consulate in Winnipeg who went to great lengths to locate this document through the State Department's International Information Programs Section in Washington.

In his introductory editorial, Wigmore started this way: [11]

> The State is apt to be indifferent and heartless when its own wrongdoings and blunders are to be redressed. The reason lies partly in the difficulties of providing proper machinery and partly in the principle that individual sacrifices must often be borne for the public good. Nevertheless, one glaring instance of such heartlessness, not excusable on any grounds, is the State's failure to make compensation to those who have been erroneously condemned for crime.

Having subjected the citizen to meritless allegations, Wigmore felt that the State should at least try to compensate for the wrong done: [12]

> To deprive a man of liberty, put him to heavy expense in defending himself and to cut off his power to earn a living, perhaps also to exact a money fine – these are sacrifices which the State imposes on him for the public purpose of punishing crime. And when it is found that he incurred these sacrifices through no demerit of his own, that he was innocent, then should not the State at least compensate him, so far as money can do so?

Borchard's commentary followed Wigmore's impassioned plea. It was fueled by the case of Andrew Toth, who had recently been convicted of murder in Pennsylvania for which he had been sentenced to life imprisonment. After having served 20 years in jail, he was found innocent of the crime. There was no law at the time providing for compensation; however, philanthropist Andrew Carnegie pensioned him at $40 per month. In contrast, Adolph Beck, who had been exonerated of a crime for which he had spent seven years in prison, had been granted an *ex gratia* payment of five thousand pounds by the British Parliament. [13] On this state of affairs, Borchard said: [14]

> In an age when social justice is the watchword of legislative reform, it is strange that society, at least in this country, utterly disregards the plight of the innocent victim of unjust conviction or detention in

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[11] *Ibid.* at page 8.

[12] *Ibid.*

[13] Eric R. Watson, *Adolf Beck* (Toronto: Canada Law Book Company, Ltd.). The Beck case ultimately led to the establishment of a Court of Criminal Appeal in the United Kingdom.

[14] Borchard, *supra*, at page 5.

> criminal cases. No attempt whatever seems to have been made in the United States to indemnify these unfortunate victims of mistakes in the administration of the criminal law, although cases of shocking injustice are of not infrequent occurrence.

In his article, Borchard described in considerable detail the enabling statutes throughout Europe, the practice that had developed, as well as the theoretical framework underlying compensation to those who had been wrongfully convicted. He concluded that while the principle had been clearly recognized, remedies were, in practise, only granted within the narrowest limits of the law. He added: "...the procedure is generally very complicated; in fact so complicated that it is hard to understand how the poor acquitted individual thrown out in the world can ever find the means to prosecute his claim." [15]

c) Borchard Study (1932)

The first systematic research on miscarriages of justice was done by Borchard some 20 years later as a professor of law at Yale University. His classic 1932 work *Convicting the Innocent*[16] identified a total of 65 American and British cases in which innocent defendants had been convicted of felonies; 29 for murder, 23 for robbery and like offences, and 13 for lesser offences such as forgery, assault, attempted bribery and prostitution.

Geographically, his study cut across 26 different states, as well as the District of Columbia and England. In the cases chosen for inclusion, innocence was established in several ways: where the allegedly murdered person turned up alive; by the subsequent conviction of the real culprit; or by the discovery of new evidence which demonstrated, through a new trial, or to the satisfaction of a state governor or the president of the United States, that the wrong person had been convicted.[17]

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[15] *Ibid.* page 20.

[16] The book quickly proceeded through two editions. The first, published by the Yale University Press in 1932, emerged in a cream-coloured cloth binding with green lettering, and totaled 421 pages. It was structured as a series of case studies, and contained no photographs. The second, undated but seemingly published in 1932 or shortly afterward by the Garden City Publishing Company in New York, was sold in a black cloth binding with red letters. It had 383 pages, was structured more as a series of "stories," and included a number of fascinating case photographs. Both appear rarely on the world market, and the first "cream" edition is especially scarce: see www.abebooks.com, and follow the prompts.

[17] *Ibid.* at page vi.

Borchard found the principal causes of wrongful conviction were: mistaken identification; circumstantial evidence leading to erroneous inferences; perjury; or some combination of these factors.

More importantly, Borchard also described several *environmental* factors that allowed wrongful convictions to occur. The first involved public pressure to solve horrific crimes:[18]

> ...it is common knowledge that the prosecuting technique in the United States is to regard a conviction as a personal victory calculated to enhance the prestige of the prosecutor. Except in the few cases where evidence is consciously suppressed or manufactured, bad faith is not necessarily attributable to the police or prosecution; it is the environment in which they live, with an undiscriminating public clamor for them to stamp out crime and make short shrift of suspects, which often serves to induce them to pin a crime upon a person accused.

Borchard framed the issue in these terms:[19]

> Public opinion is often as much to blame as the prosecutor or other circumstances for miscarriages of justice. Criminal trials take place under conditions with respect to which public interest and passions are easily aroused. In fourteen of the cases in this collection in which the frightful mistake committed might have been avoidable, public opinion was excited by the crime and moved by revenge to demand its sacrifice, a demand to which prosecutors and juries are not impervious. This can by no means be deemed an argument for the abolition of the jury, for judges alone might be equally susceptible to community opinion. But it is a fact not to be overlooked.

Borchard concluded that two further environmental factors tend to foster wrongful convictions. First, evidence in court of a previous criminal conviction, which he said was "often fatal to an accused person."[20] Second, Borchard concluded that the decision by an accused to exercise one's right to remain silent often left a sour taste in the mouth of a jury:[21]

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[18] *Ibid.* at page 369

[19] *Ibid.* at page 372.

[20] *Ibid.* at page 369-70.

[21] *Ibid.* at page 371.

> Refusal to take the stand – under circumstances where an explanation from the accused is naturally expected – even if it cannot be commented upon by judge or prosecutor, inevitably affects the jury unfavorably; but in addition, the accused's known privilege of refusing to testify influences the police to exact "confessions" which, whether true or not, stigmatize the system of obtaining them as a public disgrace.

Borchard's work is important for several reasons. He was the first to approach the subject in a systematic, analytical way. His conclusion that eyewitness miss-identification is the primary reason for wrongful conviction has been confirmed in virtually every study since then. But there is one thing that he left as an enduring legacy: the notion that "circumstances" or "environmental factors" can serve to foster a wrongful conviction. We can debate what they are, and at the end of this paper, I will set out my views on the subject. But there can be no doubt that certain environmental factors can serve to nurture a wrongful conviction.

d) Franks' Study (1957)

Twenty-five years passed before any further analytical studies of significance emerged. In 1957, Jerome Frank, a judge of the U.S. Circuit Court of Appeals, published a book entitled *Not Guilty*, in collaboration with his daughter Barbara Frank and Harold M. Hoffman, a lawyer from New York.[22] The book traces 36 cases of wrongful conviction, and points to several systemic causes: mistaken testimony, especially by eyewitnesses; defective understanding of the evidence by jurors; an adversarial process that allows a fight mentality to emphasize strategies and success rather than the discovery of the truth; and a meager disclosure process that stacks the cards against the defendant from the outset.

The Franks spent considerably more time than Borchard analyzing the underlying *causes* of wrongful conviction. They were struck by the human nature of the process, noting that the weaknesses of those involved can, in many cases, affect the outcome.

Judge Frank argued that when an honest witness testifies to a fact, he represents three things under oath: that he accurately *saw* the event; that now, in the courtroom, he accurately *remembers* what he encountered; and that he is now

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[22] *Not Guilty*, by Judge Jerome Frank and Barbara Frank, in association with Harold M. Hoffman (Doubleday and Company, Inc., Garden City, New York, 1957.) Jerome Frank died following the last changes to the manuscript and Barbara Frank pursued publication with an endorsing foreword by William O. Douglas, a justice of the Supreme Court of the United States.

accurately *reporting* his memory. Into each of these three elements, Judge Frank contended, error can enter, leading to mistaken testimony.[23] Quoting judicial and psychological authority of the day, Judge Frank added: "The great body of honest testimony is subjectively accurate but objectively false…observation is a complex affair; it is mingled with inferences, judgments (and) interpretations."[24]

"What is lost from memory," Judge Frank concluded, "is often replaced by products of the imagination," sometimes referred to as "creative forgettery" or "imaginative memory." This psychological phenomenon allows a witness to retouch the details, and unconsciously fill in memory gaps. Powerfully, Judge Frank argued that "witnesses who are perfectly honest are in danger of turning inferences into recollections."[25]

The unconscious prejudice of otherwise honest witnesses may influence memory subtly yet significantly. Judge Frank gave an illustration:[26]

> Other kinds of unconscious prejudice may perniciously influence memory: You see a fight between the police and union pickets. Your original impression was confused. If you are an ardent union sympathizer, you may later remember with clarity that the police brutally assaulted the pickets. "Honest" bias... may "be the deciding factor in filling in the gaps of memory."

His own analysis, psychological views at the time, as well as judicial conclusions throughout the United States in a wide variety of cases, led Judge Frank to view uncorroborated testimony with great caution:[27]

> The courts, then, agree with the psychologists about the treachery of memory. They agree that memory is the weakest element in testimony; that, because of the numerous unknown factors that affect it, a witness' memory is often not trustworthy as a proof of any fact in a trial.

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[23] *Ibid.*, at page 200.

[24] *Ibid.* at page 202.

[25] *Ibid.* at page 210; to the same effect, see *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.) in which the court, at page 451, noted literature which suggests that witnesses are inclined to fill in perceived events with other details: "They will relate their testimony in good faith, and as honestly as possible, without realizing the extent to which it has been distorted by their cognitive interpretive processes."

[26] Frank, *supra.*, at page 213.

[27] *Ibid.* at page 212.

e) Du Cann Study (1960)

In 1960, C.G.L. Du Cann, a British barrister, published the book *Miscarriages of Justice*.[28] Intended for the general reader as well as members of the legal profession, his book was revolutionary and quite flamboyant. As he put it in the preface: "Here is this book: A sacrilegious and blasphemous brawler in that holy of holies, the Temple of Justice."[29]

Quite frankly, I'm not sure if he really advanced the debate in a helpful or realistic way. However, his work is regularly cited[30] and, for that reason alone, I think it appropriate to make at least a few comments on his principal thesis and recommendations.

Using nine English cases of actual or apparent wrongful convictions as a basis for his comments, Du Cann advocated fundamental changes to criminal law, procedure and the rules of evidence. English criminal law, he said, was both uncertain and overly rigid. On the issue of common law precedents, Du Cann bluntly argued that "the dead hand rules us."[31] He advocated the enactment of a criminal code that would provide a principled approach that was measured in application, and certain in response.

Du Cann argued forcibly that our criminal procedure needs a "roots and branch" reform, not just pruning: [32]

> What seems harmless and picturesque in our courts to the unreflecting mind is harmful indeed by giving the falsity and a sense of unreality to the truth and justice for the sake of which alone the courts exist. Theatrical costume, tawdry play-acting, lying rhetoric, bombastic and blasphemous oaths should go. The form of trial might well be rather inquisitorial than accusatorial and real expression given to the idea that the accused is innocent until the court has convicted him.

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[28] Frederick Muller Limited, London, 1960.

[29] *Ibid.* at page 6.

[30] For example, see Ruth Brandon and Christie Davies, *Wrongful Imprisonment* (London: George Allen and Unwin Ltd., 1973).

[31] Du Cann, *supra.*, at page 266.

[32] *Ibid.* at page 267.

Traditional rules of evidence came under particularly vicious attack. He said:[33]

> Suppression of truth in courts professing to seek "the truth, the whole truth and nothing but the truth" should not be tolerated even in the fancied or real interest of the prisoner. For instance, modern juries under careful judicial directions are sufficiently educated and sophisticated to understand that a man may be an habitual thief and yet have not committed the present theft alleged, and to be on their guard against prejudice arising from this.

Challenging conventional practices such as the single-judge system of criminal justice, evidence taken under an oath, reliance on the adversarial rather than the inquisitorial system, Du Cann summarized his principal thesis in the following passage:[34]

> And the moral is that miscarriages of justice may well take place in the courts as they are today. The deliberately cultivated atmosphere of pretense and unreality and theatricality by costume and speech does not encourage truth. Nor does the outmoded oath and the tolerance of perjury. A trial procedure exists which does not seek truth so much as the hunting down of the quarry – which is accusatory rather than inquisitory, and to which cling out-moded unfairnesses between prosecution and defence, as well as unequal advocacy which may tip the scales of justice to the wrong side, the rules of which remain unfair as between prosecution and defence in some important respects; substantive law very often uncertain and unintelligible or unnecessarily complex and confusing; the triumph of mere precedence over right reason and the unrealities of the past over the present; the sentence gamble dependent upon single-judge idiosyncrasy; and the obstinate refusal to modernise court machinery: – these are a few of the characteristics of our British methods which may be confidently expected to militate against justice.

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[33] *Ibid.* at page 268.

[34] *Ibid.* at pages 177-8.

f) Radin Study (1964)

Crime analyst Edward Radin published *The Innocents* in 1964.[35] Focusing on 80 new cases of wrongful conviction, Radin's conclusions about the causes of wrongful conviction echoed those of his predecessors: police-coerced confessions; single eyewitness misidentification; inadequate disclosure by the prosecution; and inadequate resources to defend difficult cases.

He raised two further points that had received only scant attention before. They are, in my view, critical factors for consideration.

First, Radin deplored the "game theory" of criminal cases, under which the prosecutor "view(s) a trial as a kind of game…they are so busy planning how to outwit, outsmart and outmaneuver an opponent that they forget that justice is the sole purpose of the criminal trial."[36]

Second, Radin urged the legal profession to closely examine the circumstances surrounding a wrongful conviction, to learn what occurred and to take steps to prevent future occurrences. The conviction of an innocent person should, he argued, "ring an alarm bell" within the broad legal community.[37]

g) Brandon and Davies Study (1973)

Class distinctions emerged as a critical factor in a British study published in 1973 by Ruth Brandon and Christie Davies.[38] Discussing the *profile* of the person most commonly imprisoned wrongly, the authors said: [39]

> On the whole, they seemed to be a normal cross-section of the people who normally get sent to jail. Most of them have previous records of committing the kind of crime of which, this time, they were wrongfully convicted. Most of them did unskilled work. Many

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[35] Edward D. Radin, *The Innocents* (New York: William Mauro and Company, 1964)

[36] *Ibid.* at page 35.

[37] *Ibid.* at page 230.

[38] Ruth Brandon and Christie Davies, *Wrongful Imprisonment* (London: George Allen and Unwin Ltd, 1973).

[39] *Ibid.*, page 22.

> were unemployed or only did casual jobs. Very few were drawn from the middle class or from the respectable working class.

Building on the work done by Borchard, Judge Frank and Du Cann, Brandon and Davies reviewed 70 cases of acknowledged wrongful imprisonment[40] and concluded that recurring themes were emerging in Anglo-based criminal justice systems:[41]

> Patterns which emerged frequently in both groups as causes of imprisonment were: unsatisfactory identification, particularly by confrontation between the accused and the witness; confessions made by the feeble-minded and the inadequate; evidence favorable to the defence withheld by the prosecution; certain joint trials; perjury, especially in cases involving sexual or quasi-sexual offences; badly conducted defence; criminals as witnesses.

Reform proposals put forward by the authors were, at the same time, progressive and heretical in nature: the prosecution "should be required to disclose any evidence it may possess which is favourable to the defence, *whether or not it is proposing to use it during the trial.*"[42] More radically, however, the authors contended that the defence should be required to give some details concerning the case it intended to present, well beyond its present common law obligation to disclose alibi evidence.[43]

h) Royal Commissions in Australia and New Zealand During the 1980s

From the discussion thus far, it is apparent that the analyses of wrongful convictions until the 1970s were, for the most part, undertaken by concerned *individuals*. Some of these analyses were scholarly in nature; others were not, and seem a bit sensational – perhaps intended for a mass audience rather than as an instrument of reform. The prevailing public view, however, continued to be: Yes, there are occasional errors, but they are simply aberrations in an otherwise strong and flawless legal system.

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[40] *Ibid.*, page 19: Those granted pardons or those whose convictions were overturned by The Court of Appeal.

[41] *Ibid.* at page 21.

[42] *Ibid.* at page 255.

[43] *Ibid.* at page 256.

As the 1980s approached, the landscape shifted in two ways. First, it became abundantly clear that wrongful convictions were occurring in virtually all Anglo-based criminal justice systems. Second, serious questions were being raised about whether some not-so-subtle *systemic* practices were contributing significantly to the problem.

At this point in my review of the analytical studies on the subject, I intend to shift my approach as well. The issue can now, I believe, be dealt with by grouping cases or initiatives together – starting with a series of Royal Commissions in Australia and New Zealand during the 1980s. Following that, I will discuss the infamous IRA bombing cases in the United Kingdom, as well as three Royal Commission reports that examined the situation in Canada. I will end this part with an analysis of the inter-relationship between the death penalty and the startling emergence of wrongful convictions (and perhaps wrongful *executions*) in the United States.

In Australia, the Chamberlain Case[44] (sometimes known as the Dingo Baby Case) has gripped the nation for over two decades.[45]

Alice Lynne Chamberlain was convicted in 1982 of the murder of her nine-week old daughter, Azaria. Her husband, Michael Leigh Chamberlain, was convicted of being an accessory after the fact. The Crown's case lacked any evidence of motive or confession, and neither a murder weapon nor the body of the child was found. Mrs. Chamberlain contended that a dingo (a wild dog) had run off with the child. Australians closely followed Chamberlain's trial and appeal in the 1980s, and were split over whether to believe her story. Bumper stickers reading "The Dingo Did It" and "The Dingo is Innocent" were often seen as the case progressed through the courts. After Mrs. Chamberlain had spent three and a half years in prison, a Royal Commission into the case concluded "that there are serious doubts

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[44] *Chamberlain v the Queen* (No. 2) (1984) 153 C.L.R. 521 (H.C.)

[45] The case went to trial in 1982. It has continued to attract both Australian and international attention well into the 21st Century: see "Witch Hunt" by Paul Toohey (Australian journalist of the year) in *The Australian* (July 15, 2000): www.theaustralian.com.au/extras/toohey/s1s1.html and "Scientist in Dingo Case at Heart of Ambush Inquiry," by Patrick Barkham, in Sydney, published in *The Guardian* (UK) on February 25, 2002: www.guardian.co.uk/uk_news/story/0,3604,656540,00.html. In 2004, a claim by one Frank Cole that, hours after the disappearance of the baby he found Azaria's body in the jaws of a dingo he had just shot, touched off international headlines: "I took her body out of its jaws", by Adrian Tame, (Melbourne) Sunday *Herald Sun* (July 5, 2004): http://www.heraldsun.news.com.au/common/story_page/0%2C5478%2C10033147^662%2C00.html; "Man says he retrieved missing baby's body from dingo's mouth", abc El Paso, Texas (July 4, 2004: www.kvia.com/Global/story.asp?S=1997209; "New twist in 'dingo ate my baby' mystery", CalgarySun.Com (Canada): http://www.canoe.ca/NewsStand/CalgarySun/News/2004/07/04/524475.html. The leading book on the case was written by John Bryson, an author and trial lawyer: *Evil Angels* (New York: Summit Books, 1985).

and questions as to the Chamberlains' guilt and as to the evidence in the trial leading to their convictions."[46] The Commissioner concluded that there was absolutely no evidence of human involvement in the child's disappearance and apparent death.

Shortly afterward, the Northern Territorial Government pardoned Mrs. Chamberlain and her husband. They were awarded over $1 million in compensation. Scientific evidence, in particular blood examinations, which had been critical to the Crown's case at trial, had been fully discredited during the Royal Commission. As well, it was concluded that a key forensic witness had taken on the role as a protagonist rather than a "dispassionate provider of scientific information."[47]

In the wake of the Royal Commission Report, Judy Bourke argued in the *Australian Bar Review* that scientific evidence is frequently misused in criminal trials because it often is unreliable, yet shielded from scrutiny by an ever-present aura of scientific certainty.[48] In the end, it was clear in the Chamberlain case that questionable police conduct, coupled with unreliable forensic evidence, had been woven together to support a mistaken prosecution theory that a tragic death was actually a murder.

Scientific evidence upon which the Crown had successfully relied in securing convictions was subsequently found unreliable in a number of other Australian prosecutions during the 1980s. In the case of Edward Charles Splatt (*The Shannon Report*), the Crown's case relied on the cumulative effect of the similarities of "trace materials"[49] between the crime scene and Splatt's house. All of this evidence was later found to be unreliable.[50]

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[46] *Australia Royal Commission of Inquiry into Chamberlain Convictions* in 1987 (Honorable T.R. Morling, Commissioner), at page 342, further considered by the courts in the light of the findings of this Royal Commission in: *Reference under section 433A of the Criminal Code of the Attorney General for the Northern Territory of Australia of convictions of Alice Lynne Chamberlain and Michael Leigh Chamberlain*, [1988] N.T.S.C. 64.

[47] Paul R. Wilson, "When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia", 24 *Australian Journal of Social Issues* 3 (1989), at page 12.

[48] Judy Bourke, *Misapplied Science: Unreliability in Scientific Test Evidence*, (1993) 10 Aust. Bar Rev. 123, quoted with approval by the Honorable Fred Kaufman, *The Commission on Proceedings involving Guy Paul Morin* (Toronto: Queen's Printer for Ontario, 1998) at page 276 *et seq.* and page 327 and 342.

[49] Trace materials included seed particles, paint particles, human hair and cloth fibers.

[50] Paul R. Wilson, *supra.*, footnote 47; Kaufman, *infra.*, footnote 99, at page 284, although it is equally clear that "tunnel vision" also played a role: Kaufman, *supra.*, at page 1137.

In the murder conviction of Douglas Harry Rendell, a subsequent inquiry (*The Hunt Report*) found critical blood tests unreliable, and recommended a pardon.[51] Similar results were reached in the case of Gidley in New South Wales, with blood tests dating back to 1983, and Cannon, a 1991 case with degraded DNA samples.[52]

Curiously, legal analysts in Australia have suggested that eyewitness misidentification, a major cause of wrongful convictions in North America, has *not* emerged as a major cause in Australia. That noted, established North American patterns clearly emerged "downunder," including: [53]

a) police practices (over-zealousness, unprofessional conduct, incompetence)
b) unreliable evidence (expert as an advocate or protagonist, weak circumstantial evidence)
c) unreliable secondary sources (police informants, prison informants, etc.)
d) media and public pressure to convict

New Zealand has not avoided the specter of wrongful convictions. In 1970, Arthur Allen Thomas was charged with the murder of two people. After a series of trials, appeals, retrials and petitions to the governor general, Thomas remained convicted.[54] Concerned forensic scientists, who had testified at trial for the defence, published two books questioning the validity of certain key evidence,[55] and a 1978 book *Beyond Reasonable Doubt?* by British author David Yallop prompted the Prime Minister of New Zealand to appoint an eminent counsel to review the case.[56] As a result, Thomas received a free pardon. A Royal

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[51] Judy Bourke, *supra.*; Kaufman, *supra.* at page 287.

[52] Judy Bourke, *supra.* at pages 136-7, footnote 55, Paul R. Wilson, *supra.*, at pages 11-12.

[53] Paul R. Wilson, *supra.*, footnote 47, at page 8 *et seq.*

[54] *Report of the Royal Commission to Inquire into the Circumstances of the Convictions of Arthur Allen Thomas for the Murders of David Harvey Crewe and Jeanette Lenore Crewe* (Wellington, New Zealand: Government Printer, 1980), at pages 13-17.

[55] Dr. T. J. Sprott and Pat Booth, *ABC of Injustice: The Thomas Case* (Auckland: Arthur Thomas Retrial Committee, not dated, 39 pages); *Trial by Ambush*, by P.J. Booth, both of which are referred to in the *Report of the Royal Commission, ibid.*, at page 16.

[56] *Beyond Reasonable Doubt?*, by David Yallop (London: Hodder and Stoughton, 1978). Parenthetically, Mr. Yallop subsequently testified for the defence during the trial of the Maguire Seven. Sir John May found, however, that Yallop had been effectively and successfully discredited in cross-examinations by Sir Michael Havers, then Attorney General of England and Wales. See the discussion of this point, Morin Report, *infra.* footnote 99 at pages 271-2.

Commission subsequently was established to investigate the circumstances surrounding his conviction.

The chairman of the Royal Commission, the Honourable R. L. Taylor, a former Justice of the Supreme Court of New South Wales, noted that the "case had always attracted widespread publicity and public concern."[57] In a damning report, Taylor concluded: a key exhibit at trial had been fabricated and planted at the crime scene by two of the investigating police officers; another exhibit had deliberately been switched by police; police had engaged in an intentional cover up of their activities; and a scientific expert witness had displayed "a disturbing lack of neutrality" during and after testifying.[58] The "high handed and oppressive actions of those responsible for his convictions" prompted Taylor to recommend an *ex gratia* compensation payment of $1 million[59] – advice that the New Zealand government followed with little hesitation.

The Australian and New Zealand reports during the 1980s are significant for two reasons. No longer was forensic evidence inviolable. The scientist in the white lab coat could be wrong – either through inadvertence, incompetence or outright fraud and perjury. More significantly, their experience illustrates that the cases in which the public are most concerned (brutal murders and the killing of young children, for instance) and where the stakes are the highest are precisely the types of cases where those responsible for bringing a perpetrator to justice resort to tactics that ultimately undermine the entire case for the prosecution.

i) IRA Bombings in Britain

On January 30, 1972 "Bloody Sunday," British paratroopers killed 13 unarmed Catholics during a peaceful civil rights march in Londonderry. On July 21, 1972, the IRA rocked Belfast with 22 bombs in 75 minutes, leaving nine dead and 130 injured. A politically fueled bombing campaign ensued during the next decade, with 3,637 lives lost in what the Irish now refer to as "The Troubles."[60]

This was not, however, just an issue of statistics. Most of those killed were civilians: mothers, fathers, shoppers, pub-goers and children. The public was outraged and frightened. In many minds, the IRA had become "Public Enemy

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[57] Thomas Royal Commission report, supra., footnote 54, at page 16.

[58] *Ibid.* at pages 96-98.

[59] *Ibid.* at page 120.

[60] *Irish Republican Army*: www.terrorismanswers.com/groups/ira.html at page 2; *Lost Lives*: www.rte.ie/news/archive/lostlives/adams.html

Number One". It was from this pool of citizens that police investigators would be selected to investigate IRA bombings over the next several years. And it was from precisely this same pool that judges and jurors would hear cases that, regrettably, led to terrible miscarriages of justice in Britain during the 1980s.

- *Guildford Four*

Their collective name is well known: The Guildford Four (Paul Hill, Gerard Conlon, Patrick Armstrong and Carole Richardson) spent 14 years in prison before their convictions for two IRA bomb explosions in Guildford on October 5, 1974 were quashed by the Court of Appeal in 1989.[61] Hill, only 21 when he was arrested, spent more than 1,600 days in solitary confinement.

Gerry Conlon, a 20-year-old, happy-go-lucky, hard drinking petty thief who liked to chase girls, said this of the "confessions" he had signed during the police investigation:[62]

> When I signed them, I believed I would later be able to retract them. I believed they could never be shown to hold water. I didn't realize I was signing away my liberty for the next 15 years.

He added:

> I think in the end it boiled down to the fact that the lawyers were terrified of dealing with terrorist offences, uncertain about the new Act, ignorant about the IRA and how it operates and overwhelmed by the blind determination of the police to get us convicted at any cost.[63]

In 2000, Prime Minister Tony Blair apologized to the Guildford Four for their wrongful conviction. In a letter, Mr. Blair acknowledged the "miscarriage of justice" which they suffered as a result of their wrongful convictions. The apology, personally signed by the Prime Minister, was sent by him to Paul Hill's wife, Courtney Kennedy Hill, the daughter of the assassinated American Attorney General Robert Kennedy and niece of the late John F. Kennedy. The Prime Minister said: "I believe that it is an indictment of our system of justice and a

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[61] The case of The Guildford Four was immortalized in the book *In The Name Of The Father* (Penguin Books: 1993); and in the movie *In The Name Of The Father*, released by Universal Pictures in 1993, starring Daniel Day-Lewis and Emma Thompson.

[62] *Justice: Denied* - - The Magazine for the Wrongly Convicted: www.justicedenied.org/inthenameofthefather.htm at page 2.

[63] *Ibid.* at page 4.

matter for the greatest regret when anyone suffers punishment as a result of a miscarriage of justice. There were miscarriages of justice in your husband's case, and the cases of those convicted with him. I am very sorry indeed that this should have happened".[64]

- *Birmingham Six*

Five weeks after the bombing at Guildford, two further explosions occurred at pubs in Birmingham in the British Midlands.[65] Twenty-one people were killed, and 162 injured. One week earlier, an active member of the IRA, James McDade, had been killed when a bomb he was in the process of planting at a telephone exchange exploded prematurely.[66] The bombs were of similar construction to all of those that exploded during the 1974 IRA campaign. [67]

Six Irish Catholic men were charged with 21 counts of murder, convicted by a jury, and spent 16 years in jail before being freed by the Court of Appeal in 1991.[68] On behalf of the court, Lloyd, L.J. noted that on the basis of the evidence led at trial, the case was convincing. Nonetheless, two parts of the evidence were suspect: scientific evidence concerning bomb traces, and the police interviews. The forensic evidence was in doubt, the court concluded, and several of the police investigators "were at least guilty of deceiving the court."[69]

The Birmingham Six, as they became known, had been vilified for years as Britain's biggest mass murderers. When they emerged onto the steps of the Old Bailey in 1991, after the Court of Appeal had quashed their convictions, psychologists said they were in a condition similar to those persons who have been at war.[70]

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[64] BBC News: Blair Apologizes to Guildford Four, http://news.bbc.co.uk/1/hi/northern_ireland/778940.stm; also see: http://innocent.org.uk/cases/guildford4/

[65] *R v McIlkenny* (1991), 93 Cr. App. R. 287 (C.A.)

[66] *Ibid.* at page 289.

[67] *Ibid.*

[68] *Ibid.*

[69] *Ibid.* at page 318. The case has been the subject of several books: for instance, see Bob Woffinden, *Miscarriages of Justice* (London: Hodder and Stoughton, Ltd. 1965); Paddy Joe Hill and Gerard Hunt, *Forever Lost, Forever Gone* (London: Bloomsbury Publishing Ltd., 1995).

[70] *Miscarriages of Justice: The Birmingham Six*, www.guardian.co.uk/crime/article/0,2763,634024,0.html That same day, the March 14th, 1991, the Government of the United Kingdom established the Royal Commission on Criminal Justice, chaired by Viscount Runciman. Its mandate was to review the criminal justice process in England and Wales as a whole, including "the role of experts in criminal proceedings,

- *McGuire Seven*

Science continued to come under the microscope in further IRA prosecutions that resulted in wrongful convictions. The McGuire Seven, a family led by Annie McGuire, were imprisoned in 1976 for possessing explosives.[71] In the wake of the release of the Guildford Four in October, 1989 and calls for the review for the Birmingham Six, a report by former appeals judge John May persuaded the home secretary that there had been a miscarriage of justice in the McGuire Case. In July 1990, he referred the matter to the Court of Appeals; all seven of the convictions were overturned in June 1991.[72]

The McGuire Seven had been accused of running an IRA bomb factory in North London in the mid-1970s. Unlike the Guildford Four trial, scientific evidence played a pivotal role in the trial of the McGuire Seven. Critical Crown evidence included traces of nitroglycerine on the accused's hands and gloves. The Court of Appeal concluded that they may have been implicated through innocently touching a contaminated towel. Lord Justice McCowan said:[73]

> The evidence does not enable us to conclude who the person or persons were who so contaminated the towel or the gloves. On the ground that the possibility of innocent contamination cannot be excluded, *and on this ground alone*, we think the convictions of the appellants are unsafe and unsatisfactory. (Emphasis added)

Others, however, thought differently. Brian Ford, a leading scientist, openly questioned whether there had been a closing of ranks, and expressed concern that the Crown scientists had been operating a state-run service to get convictions, rather than offering independent scientific expertise.[74] He appears to have been right, and the IRA saga got even worse.

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their responsibilities to the court, prosecution and defence, and the relationship between the forensic science services and the police:" discussed in the Morin Inquiry Report, *infra.*, footnote 99 at page 276.

[71] *McGuire Seven*, http://innocent.org.uk/cases/mcguire7

[72] (1992), 94 Cr. App. R. 133.

[73] *Ibid.*

[74] Laboratorynews: http://www.sciences.demon.co.uk/aforensc.htm

- Judith Ward

Judith Ward was convicted in 1974 of 12 counts of murder and three charges of causing an explosion.[75] In three separate incidents, bomb explosions, thought to be the work of the IRA, had caused horrific damage and loss of life. The case for the Crown rested on confessions Ward made to the police and expert evidence from government scientists that traces of nitroglycerine had been found on her. She was sentenced to life in prison, and appealed neither conviction nor sentence.

Seventeen years later, the Home Secretary referred her case to the Court of Appeal for a reassessment. It was said that she suffered from a mental disorder that explained her statements to police. It was also contended that both the police and prosecution had failed to disclose evidence that would have affected the course of the trial. The most serious contention concerned the scientific evidence. It was alleged that supposedly neutral scientists had deliberately supported the prosecution efforts to convict Ward and had suppressed evidence favorable to the defence. In the end, however, the conclusions of the Court of Appeal were even more serious that that.

Glidewell, J. on behalf of the unanimous court, concluded that three senior government scientists called as Crown witnesses at trial had deliberately misled the court; that they had done so in concert; and that they had taken "the law into their own hands, and concealed from the prosecution, the defence and the court, matters which might have changed the course of the trial."[76] His assessment of the conduct of these three scientists was searing: [77]

> For the future it is important to consider why scientists acted as they did. For lawyers, jurors and judges a forensic scientist conjures up the image of a man in a white coat working in a laboratory, approaching his task with cold neutrality, and dedicated only to the pursuit of scientific truth. It is a sombre thought that the reality is sometimes different. Forensic scientists may become partisan. The very fact that the police seek their assistance may create a relationship between the police and the forensic scientists. And the adversarial character of the proceedings tend to promote this process. Forensic scientists employed by the government may come

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[75] *R v Ward*, [1993] 2 All E.R. 577 (C.A.)

[76] *Ibid.*

[77] *Ibid.*

> to see their function as helping the police. They may lose their objectivity. That is what must have happened in this case.

Appellate courts generally confine their conclusions to the facts of the case and rarely outline the lessons learned from the evidence. But that is precisely what the Court of Appeal did in this case. Asking what lessons can be learned from this miscarriage of justice, Justice Glidewell noted the importance of balancing the need to reduce the risk of conviction of the innocent with the public interest in avoiding a multiplicity of rules that merely impede effective law enforcement. In his view, there were two lessons learned. [78] The first centred on the fact that the expert witnesses had become partisan:[79]

> First, we have identified the cause of the injustice done to Miss Ward on the scientific side of the case as stemming from the fact that three senior forensic scientists at RARDE regarded their task as being to help the police. They became partisan. It is the clear duty of government forensic scientists to assist in a neutral and impartial way in criminal investigations. They must act in the cause of justice...
>
> Secondly, we believe that the surest way of preventing the misuse of scientific evidence is by ensuring that there is a proper understanding of the nature and scope of the prosecution's duty of disclosure.

Roger Cook, an English forensic scientist who later testified before a Royal Commission in Canada, noted that this case caused "tidal waves" in the international forensic community. [80]

- *Conclusions*

The legacy of the IRA bombing cases was three-fold. First, the cases demonstrate that the "hydraulic pressure" of public opinion[81] is capable of creating an atmosphere in which state authorities seek to convict someone despite the

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[78] *Ibid.*

[79] *Ibid.*

[80] Morin Inquiry Report, *infra.*, footnote 99, at page 268 (and see page 97).

[81] *Payne v Tennessee*, 501 U.S. 808 (1991), at page 868, quoting Oliver Wendell Holmes' famous statement in a dissenting judgment in *Northern Securities Co. vs U.S.*, 193 U.S. 197 (1904), at pages 400-401.

existence of ambiguous or contradictory evidence. Second, scientists working in government-operated laboratories may tend to feel "aligned"[82] with the prosecution, resulting in a perception that their function is to support the theory of the police[83] rather than to provide an impartial, scientifically-based analysis. This, in turn, raises issues concerning the physical location and reporting relationship of government or police forensic laboratories.

Finally, scientists relied upon by the Crown have an obligation to disclose to the prosecution evidence of any tests carried out which tend to cast doubt on the opinion proposed to be tendered in evidence; and the prosecution bears a parallel and continuing obligation to disclose those facts to the defence – irrespective of whether the defence has made a request for such disclosure.

j) Commissions of Inquiry in Canada

A series of wrongful convictions have emerged in Canada during the past 15 years. Individually, and as a group, these cases show that miscarriages of justice are inevitably the result of a multitude of inappropriate action by a number of people, and that solutions are usually rooted in the attitudes, practices and culture of the various participants who exercise authority in the criminal justice system.[84]

- Donald Marshall, Jr.

The story starts in Wentworth Park in Sydney, Nova Scotia on May 28, 1971. Donald Marshall Jr., a 17-year-old Aboriginal, and Sandy Seale, a 17-year-old black, met by chance and were walking through the park when they met two other men: Roy Ebsary, 59, and Jimmy MacNeil, 25. A few words were exchanged; as a result, Ebsary stabbed Seale fatally in the stomach.

The police investigation, however, led to the charging of Donald Marshall Jr., and the ensuing criminal prosecution led to his conviction for murder, for which he

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[82] In the Morin Inquiry Report, *infra.*, footnote 99, at page 298, the Honourable Fred Kaufman quoted with approval the following extract from the Crown's prosecution policy manual: "Because forensic scientists working in government-operated laboratories are more familiar with police and prosecution personnel and with prosecutorial approaches and concerns, there may be a tendency for them to feel "aligned" with the Crown. In some jurisdictions this understandable relationship between the prosecution and forensic scientists has resulted in a perception on the part of the scientists that their function was to support the police theory. Such a perception is wrong and has the potential to contribute to a miscarriage of justice". Generally, see the discussion of Fred Zain, *infra.*.

[83] *Ibid.*

[84] The Supreme Court of Canada provided a helpful summary of the miscarriages of justice that have recently occurred in Canada in *U.S.A v Burns* (2001), 151 C.C.C. (3d) 97 (S.C.C.), at paragraphs 97-101.

was sentenced to life in prison. In the end, Ebsary was found responsible and convicted by the courts,[85] but not without a series of errors and misjudgments by a number of persons in authority.

In October 1986, a Royal Commission was appointed to review the case and make recommendations.[86] It found that:

- The investigating officers responsible for the reporting of the stabbing "did not do a professional job." The work was "entirely inadequate, incompetent and unprofessional"[87]

- A subsequent police investigation "seemed designed to seek out only evidence to support (the police) theory about the killing and to discount all evidence that challenged it"[88]

- Oppressive tactics by police led to two persons giving perjured evidence which implicated Marshall[89]

- Crown counsel failed to disclose statements from witnesses which were inconsistent with their testimony at trial[90]

- Defence counsel "failed to provide an adequate standard of professional representation to their client;[91]

- The trial judge made several significant errors of law that contributed to the wrongful conviction.[92]

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[85] *R v Ebsary* (1986), 27 C.C.C. (3d) 488 (N.S.S.C. App. Div.)

[86] Royal Commission on the Donald Marshall, Jr., Prosecution (Province of Nova Scotia, 1989). Commissioners: Chief Justice T. Alexander Hickman, Chairman; Associate Chief Justice Lawrence A. Poitras, Commissioner and the Honourable Mr. Justice Gregory Thomas Evans, Commissioner.

[87] *Ibid.* at page 3.

[88] *Ibid.* at page 3.

[89] *Ibid.* at pages 3-4.

[90] *Ibid.* at page 4.

[91] *Ibid.* at page 4.

[92] *Ibid.* at page 4.

The saga did not end there, however. The errors, misdeeds and misjudgments continued even after Marshall's wrongful conviction at trial:

- Ebsary had admitted his role 10 days after Marshall's conviction. A subsequent inadequate police investigation confirmed the correctness of the conviction, and police failed to disclose this new evidence to either the Crown or defence at Marshall's subsequent appeal against conviction[93]

- The Court of Appeal which reviewed Marshall's conviction failed to identify fundamental errors of law made by the trial judge[94]

- When the Minister of Justice ultimately referred the case to the Court of Appeal for reconsideration a second time, one of the judges on the panel ought to have disqualified himself in view of the fact that he had been Attorney General of the Province at the time of the trial and resulting appeal[95]

- When the Court of Appeal ultimately quashed Marshall's conviction, it inexplicably chose to blame Marshall for his own wrongful conviction on the basis that he had really been involved in other criminal activity at the time (for which he was never charged), and had been "untruthful" at trial – a contention not sustained by the evidence. These gratuitous comments adversely affected later negotiations with government concerning compensation for his wrongful conviction.[96]

It was literally a comedy of errors, except that there was nothing humorous about what had occurred. The Commissioners made a number of recommendations that were both wide-ranging and systemic in nature. Some of the more significant of those recommendations included the following:[97]

a) Government should move towards the establishment of an independent review mechanism to facilitate the reinvestigation of alleged cases of wrongful conviction

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[93] *Ibid.* at page 4.

[94] *Ibid.* at page 5.

[95] *Ibid.* at page 6.

[96] *Ibid.* at page 7.

[97] *Ibid.* at pages 25 *et seq.*

b) Where a wrongful conviction has occurred, an independent judicial inquiry should be established to consider compensation

c) Those involved in the criminal justice system, including government officials, the bar, judges, Crown prosecutors, police officers and law students ought to take steps to ensure sensitivity to minority concerns, especially systemic discrimination toward black and native peoples

d) A statutory office of Director of Public Prosecutions should be established, with duties, responsibilities and security similar to that in England

e) The *Criminal Code* should be amended to describe the Crown's obligation in the disclosure of evidence to the defence

f) Police interviews of chief suspects and witnesses in serious crimes, such as murder, should be recorded electronically;

- *Guy Paul Morin*

On October 3, 1984 nine-year-old Christine Jessop was abducted from Queensville, Ontario. On July 30, 1992, Guy Paul Morin, her next door neighbour, was convicted of her murder[98] and it was not until January 23, 1995, almost 10 years after he was first arrested, that Morin was exonerated as a result of DNA testing not previously available.[99] The real killer has never been found.[100]

On June 26, 1996, the Province of Ontario established a Commission of Inquiry into the wrongful conviction of Guy Paul Morin. The Honourable Fred Kaufman, Q.C., formerly a judge of the Quebec Court of Appeal, was appointed as the Commissioner.[101] The Commissioner was asked to inquire into the conduct of the investigation and prosecution, report his findings, and "make recommendations as it considers advisable relating to the administration of criminal justice in Ontario."

The mandate of the Commission was three-fold: investigative, advisory and educational. The investigative role required the Commissioner to determine, to the

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[98] *R v Morin* (1988), 44 C.C.C. (3d) 193 (S.C.C.) [ordering a new trial]

[99] *The Commission on Proceedings involving Guy Paul Morin* (Toronto: Ontario Ministry of the Attorney General, 1998), the Honourable Fred Kaufman, C.M., Q.C., Commissioner, at page 1. [www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin]

[100] *Ibid.*

[101] *Ibid.*

extent possible, why the investigation into the death of Christine Jessop and the proceedings which followed, resulted in the arrest and conviction of an innocent person. The advisory role required recommendations for change intended to prevent future miscarriages of justice. The educational role meant that the public inquiry should serve to educate members of the community about the administration of justice generally and the criminal proceedings against Guy Paul Morin, in particular.[102]

During the public hearings, which lasted 146 days, 120 witnesses were called. Over 100,000 pages of trial evidence, exhibits and documents filed on appeal were considered. Twenty-five parties were given full standing, or standing confined to particular factual issues or to systemic issues only. A number of witnesses were called to testify who were either experts or participants in the administration of criminal justice from around the world. The media were present throughout.

The Commissioner released his two-volume report on April 9, 1998.[103] It contained 1,380 pages, and made 119 recommendations for change, many of which were systemic in nature. The report is arguably the most comprehensive judicial review that has ever been undertaken into the causes of wrongful conviction, and how to avoid them.

He found three principal causes for Morin's wrongful conviction: misuse of expert and scientific evidence; reliance on unreliable "jailhouse informants;" and the existence of "tunnel vision" on the part of both the investigators and the prosecution. Tragically, the first cause mirrored previous experiences in Australia, New Zealand and the United Kingdom. The second and third causes were relatively new – although it is perhaps more accurate to say that they were established causes of wrongful convictions which Justice Kaufman decided to examine from a brand new perspective.[104]

Justice Kaufman defined "jailhouse informants" ("in-custody informers") as those who allegedly received a statement from the accused, while both were in custody, which related to an offence committed outside the institution.[105] Of this category of witness, he said: [106]

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[102] *Ibid.*, Executive Summary, page 2.

[103] *Ibid.*

[104] As I will outline later on in this paper, the reliability of "jailhouse informants" was examined extensively in the United States in 1989.

[105] Morin Inquiry Report, *supra.*, at page 601.

[106] *Ibid.* at page 602.

> In-custody informers are almost invariably motivated by self-interest. They often have little or no respect for the truth or their testimonial oath or affirmation. Accordingly, they may lie or tell the truth, depending only upon where their perceived self-interest lies. In-custody confessions are often easy to allege and difficult, if not impossible, to disprove.

Two jailhouse informants were called at Morin's trial. The first, Robert May, had a substantial criminal record for crimes of dishonesty. He admitted lying to police. He had been diagnosed as a pathological liar, with little social conscience. After the final trial, he recanted his evidence. Then he recanted his recantation, and took the position that he had testified truthfully. The Commissioner found that he had "spun a web of confusion and deceit about the issue of Morin's confession."[107]

The second witness, identified only as Mr. X, had been cut from the same cloth. He had a lengthy criminal record for sexual offences against children. He also had been diagnosed as having a personality disorder with sociopathic tendencies – a condition characterized by exaggeration and lying. He had lied to police, and told the Crown at the inquiry that sometimes he lost contact with reality – hearing voices that told him to commit offences. The Commissioner found him to be "an untrustworthy person whose testimony cannot be accepted on any of the issues."[108] Both witnesses claimed that they were motivated to testify because they were morally outraged by Morin's crime – a position rejected by the Commissioner on the basis that it was clear on the evidence that both witnesses were seeking to further their own ends.[109]

Rejecting submissions in favour of banning such evidence, Kaufman concluded that the use of jailhouse informants should be limited through the exercise of prosecutorial discretion by adherence to strict, publicly available Crown guidelines. Key elements of that policy, he said, should include: [110]

a) A statement recognizing that the reception of such evidence is dangerous; has previously resulted in miscarriages of justice; and that

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[107] Morin Inquiry Report, Executive Summary, pages 9-10.

[108] Morin Inquiry Report, Executive Summary at page 10.

[109] Executive Summary at page 10.

[110] Morin Inquiry Report, page 602 *at seq*; the list is not exhaustive.

"the danger of an unscrupulous witness manufacturing evidence for personal benefit is a significant one."[111]

b) The seriousness of the offence, standing alone, is insufficient to justify calling the witness.[112]

c) It is not in the public interest to prosecute an offence based solely on the unconfirmed evidence of a jailhouse informant.[113]

d) The Crown should establish an in-custody informer committee, composed of senior prosecutors, to consider the advisability of calling such witnesses in individual cases.[114]

e) Specific criteria should be reviewed to assess reliability. The Commissioner listed 14 criteria, including the extent to which the informer's statement is confirmed by other evidence; specificity of the proposed evidence; unique knowledge; criminal record; benefits requested or provided; previous track record as an informant, etc. (the full list is reproduced at the Morin Inquiry Report Website).[115]

f) Any agreements with the informer should be reduced to writing, signed, or videotaped.[116]

g) Benefits ought to be fixed (and provided) *before* the informer testifies.[117]

h) An in-custody informer registry ought to be established and made available to Crown, defence counsel and police agencies.[118]

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[111] Morin Inquiry Report at pages 604-5.

[112] Morin Inquiry Report at page 604.

[113] *Ibid.* at pages 604-5.

[114] *Ibid.* at page 606; this is presently in place in Ontario and Manitoba. The Manitoba policy can be found at: http://www.gov.mb.ca/justice/sophonow/appendix/appendixf.pdf

[115] www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin

[116] *Ibid.* at page 611.

[117] *Ibid.* at page 613, and see the Privy Council decision in *R v McDonald*, [1983] N.Z.L.R. 252 (P.C.)

[118] *Ibid.* at pages 625-6; the Commissioner also recommended a positive obligation on prosecutors to provide information to this registry; he also encouraged the establishment of a national registry. Manitoba's registry is available to the public.

Commissioner Kaufman next considered the issue of "tunnel vision," which he defined to mean "the single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably colour the evaluation of information received and ones conduct in response to that information."[119] Evidence before him suggested that the causes of tunnel vision are systemic and structural, in the nature of a "mind set," and that they had previously arisen both in Australia and in Canada.[120]

In Morin's case, he found that the prosecutor at the second trial had not objectively assessed the reliability of the two jailhouse informers. "The prosecutor's views," he added, "were no doubt coloured by their genuine views on Guy Paul Morin's guilt." As a result, evidence which undermined the informants was more easily discarded, and largely inconsequential evidence became confirmatory. He found that the lead prosecutor in Morin's second and final trial had demonstrated "tunnel vision in the most staggering proportion," both during the trial and in his testimony before the Commission of Inquiry.[121]

In the result, Commissioner Kaufman found that the case of Guy Paul Morin was not an aberration. His wrongful conviction flowed from systemic problems as well as serious errors in judgment by individuals, often resulting from a lack of objectivity:[122]

> ...the causes of Mr. Morin's conviction are rooted in systemic problems, as well as the failings of individuals. It is no coincidence that the same systemic problems are those identified in wrongful convictions in other jurisdictions worldwide. It is these systemic issues that must be addressed in the future. As to individual failings, it is to be hoped that they can be prevented by the revelation of what happened in Guy Paul Morin's case and by education as to the causes of wrongful convictions.

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[119] *Ibid.* at page 1136. Sometimes referred to as "confirmatory bias" in other jurisdictions: Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*," 68 *Fordham L. Rev.* 1379 (2000) at page 1405.

[120] *Ibid.* at page 1137.

[121] *Ibid.* at page 490.

[122] *Ibid.* at page 1243.

- *Thomas Sophonow*

The still unresolved killing of a 16-year old girl working in a Winnipeg donut shop provided the basis for Canada's most recent public inquiry into a wrongful conviction.[123] The 2001 Cory Commission was arguably the broadest Commission of Inquiry yet, reviewing issues concerning the police investigation, criminal prosecution, practices and systemic issues that may have contributed to the wrongful conviction, financial compensation and the principles underlying compensation for those wrongfully convicted of a serious crime.[124]

On December 23, 1981 Barbara Stoppel was strangled shortly after she arrived at work. She lived a few days on life support, then died. The public was outraged by the murder. The media reflected that sentiment. The coverage was extensive, detailing not only the crime but the police investigation and all of the proceedings that followed.

Thomas Sophonow, a resident of Vancouver, was arrested and charged with the murder 10 weeks later. He underwent three trials. The first ended a mistrial, as the jury was unable to reach a unanimous verdict. At the second and third trials, he was convicted. In both instances, the Court of Appeal overturned the verdict, directing a new trial on the first occasion and, on the last, acquitting him.[125] The Supreme Court of Canada then refused leave to appeal that decision.[126] The case, at that point, seemed to come to a legal conclusion.

It was not, however, quite as simple as that. Both the Chief of Police and the Attorney General suggested that, despite the acquittal, he was still actually guilty.[127] An aura of criminal responsibility continued over Sophonow's head for the next 15 years.[128]

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[123] Two further public inquiries are presently pending in Canada: see footnote 148, *infra*.

[124] *The Inquiry regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: The Honourable Peter Cory, Commissioner: September 2001). The full report is on the Internet, and the mandate is attached as Appendix A to the report: http://www.gov.mb.ca/justice/sophonow/toc.html

[125] *R v Sophonow (No. 2)* (1986) 25 C.C.C. (3d) 415 (Man. C.A.). For a listing of all of the law reports of this case, see footnote 255, *infra*.

[126] *Ibid.*

[127] Sophonow Inquiry Report, *supra*., page 125.

[128] *Ibid.*

Sophonow's path to a public inquiry was quite different from the cases of Marshall and Morin. In Marshall's case, the real killer was found and convicted. In Morin, DNA testing showed his innocence beyond any doubt. Neither of these developments occurred in the case of Thomas Sophonow. After a full police reinvestigation prompted by Sophonow well after his final verdict of acquittal, the Chief of Police called a news conference and announced his factual innocence. While a viable suspect existed, no charges were laid.[129] Immediately after this announcement, the Attorney General called a public inquiry asking that the Honourable Peter Cory, retired Justice of the Supreme Court of Canada, "inquire into the conduct of the investigation...and the circumstances surrounding the resulting criminal proceedings commenced against Thomas Sophonow."[130]

The Order-in-Council directing the Inquiry was unprecedented in its breadth. The preamble recited that "the Attorney General is of the opinion that this course of events has raised a number of questions about the administration of criminal justice in Manitoba, and is of sufficient public importance to justify an inquiry." It asked the Commissioner to report "any findings respecting practices or systemic issues that may have contributed to or influenced" either the police investigation or resulting prosecution.

It also asked for advice on whether financial compensation should be provided in light of the acquittal by the courts and, if so, how much, as well as the basis for entitlement on the facts of the case. To avoid any further suggestion that Sophonow may actually be the guilty party, it directed Commissioner Cory to review the case "without permitting the Inquiry to become a retrial of Thomas Sophonow on the charge for which he was acquitted by the Court of Appeal."[131]

In his Report, Commissioner Cory found that the causes of Sophonow's wrongful conviction and imprisonment were multi-dimensional, one fueling the other. Chillingly, they mirrored the conclusions reached earlier in the United Kingdom, Australia, New Zealand and in the two previous Canadian Royal Commissions: eyewitness misidentification, unreliable jailhouse informants, inadequate disclosure, tunnel vision, investigative and prosecutorial misconduct and, perhaps uniquely, inadequate handling of the defence of alibi. I will comment briefly on the principal causes.

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[129] The suspect has been publicly named as Terry Arnold, now pending in British Columbia on a first degree murder charge for the killing of a 15-year-old girl: *R v Arnold* (2001), 155 C.C.C. (3d) 263 (B.C.C.A.)

[130] Sophonow Inquiry Report, *supra.*, at pages 136-8.

[131] *Ibid.*

No less than 11 jailhouse informants volunteered their services to the Crown in this case. Police and the prosecutors narrowed it down to three who were called to testify on the basis of their "credibility and reliability."[132] One offered to testify in the hope that charges pending against him would be dropped, so he could avoid deportation. This information was not disclosed by the Crown. The second witness was an established informant with the police. He was told that if he did not co-operate his status as an informer would emerge in court.[133] Again, this critical information was not disclosed to the defence. The third informant claimed "to have heard more confessions than many dedicated priests."[134] When he stepped forward in the Sophonow case, he had a significant criminal record including, incredibly, a conviction for perjury.[135] Despite this, he was called as a witness. By 2000/01 when the Cory Commission heard evidence, he had testified as a jailhouse informant in no less than nine criminal cases in Canada.[136]

Commissioner Cory's assessment of this type of evidence was unambiguous and searing:[137]

> Jailhouse informants comprise the most deceitful and deceptive group of witnesses known the frequent the courts. The more notorious the case, the greater the number of prospective informants. They rush to testify like vultures to rotting flesh or sharks to blood. They are smooth and convincing liars. Whether they seek favours from the authorities, attention or notoriety they are in every instance completely unreliable. It will be seen how frequently they have been a major factor in the conviction of innocent people and how much they tend to corrupt the administration of justice. Usually, their presence as witnesses signals the end of any hope of providing a fair trial.
>
> They must be recognized as a very great danger to our trial system. Steps must be taken to rid the courts of this cancerous corruption of the administration of justice. Perhaps, the greatest danger flows from their ability to testify falsely in a remarkably convincing

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[132] *Ibid.* at page 69.

[133] *Ibid.* at page 66.

[134] *Ibid.* at pages 68-9.

[135] *Ibid.* at page 69.

[136] *Ibid.* at page 69.

[137] *Ibid.* at page 63.

> manner...Jailhouse informants are a festering sore. They constitute a malignant infection that renders a fair trial impossible. They should, as far as it is possible, be excised and removed from our trial process.

Of tunnel vision, he said this:[138]

> Tunnel vision is insidious. It can affect an officer or, indeed, anyone involved in the administration of justice with sometimes tragic results. It results in the officer becoming so focussed upon an individual or incident that no other person or incident registers in the officer's thoughts. Thus, tunnel vision can result in the elimination of other suspects who should be investigated. Equally, events which could lead to other suspects are eliminated from the officer's thinking. Anyone, police officer, counsel or judge can become infected by this virus.

Much of Cory's Report concerned the frailties surrounding eyewitness identification. Dr. Elizabeth Loftus, arguably one of the world's leading experts in this area,[139] testified at the Inquiry. She noted that there were many problems in the evidence of the identification witnesses in the case.

Multiple witnesses who had participated in the preparation of a composite drawing of the suspect had had an opportunity to influence one another.[140] Another witness, who had been placed under hypnosis, probably allowed her recalled memory to merge with the conscious memory.[141] Media photographs of Sophonow which were published between the tentative identification given by witnesses during the investigation, and their certain identification at the trial, acted as post-event information, reinforcing the brief acquisition of memory used for the purposes of the original, tentative identification.[142] One witness, who had seen the

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[138] *Ibid.* at page 37.

[139] Dr. Loftus is a professor in the Department of Psychology at the University of Washington. She has three honorary doctorate degrees from the United States, England and Europe, is past president of the American Psychological Society and is a lifetime member of the British Psychological Society. She has been retained as a consultant in the United States, Canada, Europe and Asia, and has published on a wide range of subjects, principally eyewitness testimony, memory, psychology, repressed memory and other related topics. Her full resume is set out as Appendix E to the Sophonow Inquiry Report, *supra.*

[140] Sophonow Inquiry Report, *supra.*, at page 29.

[141] *Ibid.* at page 29.

[142] *Ibid.* at page 29.

real killer in the donut shop, made a tentative identification of Sophonow. Afterward, an investigator reinforced his identification with the result that his eyewitness identification then became certain.[143] Cory concluded: "mistaken eyewitness identification played a significant role in the wrongful conviction of Thomas Sophonow, as it has in many other cases."[144]

The Canadian experience is significant for two main reasons. First, upon a demonstration that a miscarriage of justice had occurred, government was prepared to remedy the situation fully by issuing a public apology,[145] calling a full commission of inquiry, and providing an *ex gratia* award of financial compensation. Compensation in the last two cases[146] was guided by a retired judge, and the commissions of inquiry similarly were conducted by sitting or retired Justices of Appeal. Government was prepared to have all aspects of its justice system, including the prosecutorial function, independently reviewed, and in each instance the reviewing commissioner "pulled no punches." The reports, all of which were made public, forced all of the players within the criminal justice system – especially government – to re-examine their practices, policies and cultures.

Second, all three commissions of inquiry examined systemic issues that contributed to the wrongful conviction. The mandates provided to the commissioners were clear on this point, and led the inquiry to review and compare practices around the world to those in Canada.[147]

There is, however, one major caveat: while three Canadian jurisdictions were forced to examine their own practices, it is quite unclear whether the other jurisdictions, in Canada, not faced with the spectacle of a confirmed wrongful conviction, similarly will undertake an internal review. Minimally, however, these reports provided all Anglo-based criminal justice systems with the "lessons learned," and it then falls to others to assess whether and to what extent that learning can be transported to other jurisdictions.[148]

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[143] *Ibid.* at page 25.

[144] *Ibid.* at page 30.

[145] The full text of the apology is set out, *infra.* footnote 432 and accompanying text.

[146] As well as in the case of David Milgaard: see *supra.* footnote 124 for a discussion of this.

[147] The fact that Canada was prepared to look at itself has not been lost in other jurisdictions. See Keith A. Findley, *supra.*, footnote 2 at page 342, as well as *The Report of the Governor's Commission on Capital Punishment* presented to Illinois Governor George H. Ryan in 2002, *infra.*, footnote 166 at pages 13-14.

[148] At the time of writing, two further public inquiries are pending. Several years ago, the Government of Saskatchewan indicated that it intended to call an inquiry into the case of David Milgaard; and on March

k) *The United States of America: Wrongful Executions, Not Just Wrongful Convictions*

Debate about whether wrongful convictions have occurred in the United States of America has been linked extricably with the imposition of the death penalty in that country.[149] Borchard made the point in 1932.[150] Two scholars fueled the debate in the 1980s,[151] and the controversy that has raged since then has caused one state to direct a moratorium on the imposition of the death penalty, and the governor of that state to pardon four inmates and commute the sentence of everyone else on death-row.[152]

In 1987, Professors Hugh Bedau, of Tufts University, and Michael Radelet, of the University of Florida, published the study of 350 cases in *Miscarriages of Justice in Potentially Capital Cases*.[153] These cases, heard by courts in the United States between 1900 and 1986, concerned 139 persons subsequently proven to be innocent. All had been sentenced to death; and a number came within hours or days of being executed, before executive (or judicial) action saved them.

Continuing in the tradition pioneered by Borchard, these researchers concerned themselves with "wrong-person mistakes" – the conviction or execution of the *factually innocent*.[154] They were not concerned with the erroneous conviction of those who are *legally* innocent, such as those killing in self-defence, or situations

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21, 2003 the Government of Newfoundland and Labrador announced the appointment of the former Chief Justice of Canada, Antonio Lamer, to preside over an inquiry into the wrongful conviction of Gregory Parsons: The *Newfoundland and Labrador Gazette*, volume 78, No. 13, March 28, 2003.

[149] In this respect, the debate in the United States is somewhat unique: see Michael L. Radelet *et al*, *Death Penalty Symposium: Prisoner's Released from Death Rows Since 1970 Because of Doubts About Their Guilt*, 13 T. M. Cooley L. Rev. 907 (1996); Michael L. Radelet, "Wrongful Convictions of the Innocent", 86 *Judicature* 67 (2002). It is clear, however, that the availability of the death penalty in the United States has had an impact on other countries in many ways: see, for instance *U.S.A. vs Burns*, (2001), 151 C.C.C. (3d) 97 (S.C.C.).

[150] Edwin M. Borchard, *supra.*, footnote 2.

[151] Bedau and Radelet, *supra.*, footnote 2.

[152] Jodi Wilgoren, the *New York Times*: *Systemic Problems Compel Illinois Governor to Commute Remaining Death Sentences*: http://www.tcask.org (January 11, 2003); Ryan's Speech can be found at: www.initiative-gegen-die-todesstrafe.de/George%20Ryan%20.htm.

[153] (1987), 40 Stanford Law Rev. 21.

[154] Those defendants convicted of homicide or rape and sentenced to death where no such crime had actually occurred, or the defendant was legally and physically uninvolved in the crime: *Ibid.* at page 45.

where the case failed because the evidence demonstrated a violation of the accused's constitutional rights.[155]

Bedau and Radelet concluded that there were four main causes of miscarriages of justice in death penalty cases:[156] first, and most importantly, errors by witnesses (such as mistaken eyewitness identification; witness perjury; unreliable or erroneous prosecution testimony); second, police error (such as coerced confessions and overzealous or negligent police work); third, prosecution error (such as suppressing exculpatory evidence); and, finally, other errors such as misleading circumstantial evidence, inadequate consideration of alibi evidence, or the consequences flowing from an outraged community that demands conviction.

The close link between the controversy over the death penalty and the emergence of wrongful convictions in the United States became apparent in the conclusions reached by Bedau and Radelet. They conceded that there was no evidence that ending the death penalty would reduce the likelihood of wrongful convictions. They maintained, however, that "no evidence is needed to support the claim that complete abolition of the death penalty would eliminate the worst of the possible consequences that accrue from wrongful convictions in what are now capital cases."[157]

Since then, the death penalty debate has continued to be dominated by the fear that the innocent will be sentenced to die.[158] Nine years after their seminal work on the subject, Radelet and Bedau republished their views,[159] this time observing that in the United States, the risk of executing the innocent is "inevitable."[160] The issue of race was also raised:[161]

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[155] *Ibid.* at pages 45-6.

[156] *Ibid.* at page 56 *et seq.*

[157] *Ibid.* at page 90.

[158] Radelet and Bedau, *supra.*, footnote 153; Keith A. Findley, *supra.*, footnote 2; *Report of the Governor's Commission on Capital Punishment* submitted to Illinois Governor George H. Ryan in 2002, *supra.*, footnote 147; Barry Scheck, Peter Neufeld and Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right*, originally released as *Actual Innocence: Five Days to Execution, and Other Dispatches From The Wrongfully Convicted* (New York: Signet, 2001).

[159] In Lennon/McCartney style, on this occasion the authors published as "Radelet and Bedau" as opposed to "Bedau and Radelet".

[160] *Ibid.* at page 919.

[161] *Ibid.* at page 917; more recently, see Karen F. Parker, Mari A. DeWees and Michael L. Radelet, "Race, the Death Penalty, and Wrongful Convictions", 18 *Criminal Justice* 49 (2003).

> Blacks today make up about 40% of those on death-row in America, and also approximately 40% of the cases in which people are released from death-row because of doubts about their guilt.

Parallel conclusions about the nexus between the death penalty and wrongful convictions in the United States have since been reached by a number of scholars,[162] practitioners,[163] members of the judiciary,[164] and the media.[165]

In 2000, Illinois Governor George Ryan declared a moratorium on executions in that state. The moratorium was prompted by serious questions about the operation of the capital punishment system in Illinois, which were highlighted most significantly by the release of former death-row inmate Arthur Porter after coming within 48 hours of his scheduled execution date. Porter was released from death-row following an investigation by journalism students who obtained a confession from the real murderer in the case. The moratorium subsequently sparked a nation-wide debate on the death penalty.

In March 2000, Ryan appointed a Commission to advise him, and on April 15, 2002, the commissioners published their report. It reviewed and relied upon a wide range of information, studies, and previous inquiries, including the Morin and Sophonow inquiry reports from Canada.[166]

All members of the Commission believed, with the advantage of hindsight, "that the death penalty had been applied too often in Illinois since it was re-established in 1977."[167] A narrow majority of the 17-person Commission[168] favored abolition

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[162] Keith A. Findley, *supra.*, footnote 2 at "Part C"; David Horan, *The Innocence Commission: An Independent Review Board For Wrongful Convictions*, 20 N. Ill. U. L. Rev. 91 (2000); Michael J. Saks, *Model Act: Model Prevention and Remedy of Erroneous Convictions Act*, 33 Ariz. St. L. J., 665 (2001); James S. Liebman, "Rates of Reversible Error and the Risk of Wrongful Execution", 86 *Judicature* 78 (2002).

[163] Barry Scheck *et al*, *supra.*, footnote 158.

[164] The Constitution Project, *Mandatory Justice: 18 Reforms to the Death Penalty*, referred to by Keith A. Findley, *supra.*, at footnote 91. [his text]; Gerald Kogan, "Errors of Justice and the Death Penalty", 86 *Judicature* 111 (2002) [Mr. Kogan is a former prosecutor, defence counsel, trial judge, appellate judge and Chief Justice of the Florida Supreme Court].

[165] Frederick Drimmer, *Until You Are Dead* (New York: Pinnacle Books, 1990).

[166] *Report of The Governor's Commission on Capital Punishment*, submitted to George H. Ryan, Governor of Illinois, the 15th of April, 2002 (State of Illinois, 2002). The Commissioner's report draws heavily from the Morin and Sophonow reports, especially concerning tunnel vision (page 20); jailhouse informants (pages 40 and 121); training (page 40); police culture (page 45); and recording statements (page 30).

[167] *Ibid.* at page i.

of the death penalty in the state; overall, however, the main conclusion of the Commission was that if capital punishment was to be retained, a number of significant reforms were indispensable to a fair death penalty scheme in the state.[169]

The lengthy report makes 85 specific recommendations for reforms, including recommendations to require video-taping of interrogations in capital cases; to review police procedures for obtaining eyewitness identifications; to reduce the number of circumstances under which the death penalty may be imposed; to increase the funding and training of lawyers and judges involved in capital cases; to intensify the scrutiny of the testimony of in-custody informants; and to implement new procedures for review of capital sentences.

Drawing heavily from the Morin and Sophonow reports, and in some instances adopting recommendations from those reports verbatim, the Commission gave particular emphasis to the critical role of defence counsel:[170]

> The Commission's analysis of the more than 250 cases in which the death penalty has been imposed in the years since 1977 revealed that some 21% of the reversals were the result of deficiencies in the conduct of defence counsel. Roughly 26% of the cases were reversed based upon conduct by a prosecutor that the Supreme Court found to be improper and reversible. Together, these two types of errors account for a substantial number of the cases reversed on appeal.

"The provision of qualified counsel," the Commission concluded, "is perhaps the most important safeguard against the wrongful conviction, sentencing and execution of capital defendants."[171]

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[169] *Ibid.* at pages v – vii. The Commission was composed of a retired Federal Judge as Chair, several serving or former prosecutors and public defenders, defence counsel, senior litigators from the private sector, a company president, a lawyer and author (Scott Turow) and, as Special Advisor, William Webster, a senior partner with a Washington law firm who was formerly an Appellate Judge, and Director of both the FBI and the CIA.

[169] *Ibid.* at page iii.

[170] *Ibid.* at page 191.

[171] *Ibid.* at page 105. A co-chair of the Commission has since published an article which emphasizes that implementation of the recommendations will provide significant safeguards against further wrongful convictions in both capital *and* non-capital cases: Thomas P. Sullivan, "Preventing Wrongful Convictions", 86 *Judicature* 106 (2002).

Governor Ryan's response to the Commission's report caught many by surprise. Nine months following receipt of the report, and just three days before the end of his term as Governor,[172] Ryan pardoned four inmates and, the following day, commuted the sentences of all 167 remaining death-row inmates in the state.[173] In an hour-long speech, Ryan quoted Abraham Lincoln, Supreme Court Justices Stewart and Blackmun, and expressed frustration over his inability to gain the support of the legislature in fundamental justice reforms:[174]

> Three times I proposed reforming the system with a package that would restrict the use of jailhouse snitches, create a state-wide panel to determine death eligible cases, and reduce the number of crimes eligible for death. These reforms would not have created a perfect system, but they would have dramatically reduced the chance for error in the administration of the ultimate penalty.
>
> The governor has the constitutional role in our state of acting in the interest of justice and fairness. Our state constitution provides broad power to the governor to issue reprieves, pardons and commutations. Our Supreme Court has reminded inmates petitioning them that the last resort for relief is the governor. At times the executive clemency power has perhaps been a crutch for courts to avoid making the kind of major change that I believe our system needs.
>
> Our systemic case-by-case review has found more cases of innocent men wrongfully sentenced to death-row. Because our three-year study has found only more questions about the fairness of the sentencing; because of the spectacular failure to reform the system; because we have seen justice delayed for countless death-row inmates with potentially meritorious claims; because the Illinois death penalty system is arbitrary and capricious – and therefore immoral – I no longer shall tinker with the machinery of death. I cannot say it as eloquently than Justice Blackmun. The legislature couldn't reform it. Lawmakers won't repeal it. But I will not stand for it. I must act.

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[172] At the time, the media observed that Ryan himself was under criminal investigation and may be indicted in a corruption scandal: Jodi Wilgoren, *supra.*, footnote 152.

[173] Jodi Wilgoren, *ibid.*; *Death-Row Inmates Pardoned, Winnipeg Free Press*, Saturday, January 11, 2003 at page A18.

[174] www.initiative-gegen-die-todesstrafe.de/George%20Ryan%20.htm, *supra.*, footnote 152 at page 10 of 11.

> Our capital system is haunted by the demon of error – error in determining guilt, and error in determining who among the guilty deserves to die. Because of all of these reasons today I am commuting the sentences of all death-row inmates... There have been many nights where my staff and I have been deprived of sleep in order to conduct our exhaustive review of the system. But I can tell you this: I will sleep well knowing I made the right decision.

Part III: Causes of Wrongful Convictions, and How to Avoid Them

1) Predisposing Circumstances

Criminal trials take place in the context of the social, political and economic conditions of the time. A trial may in theory be an objective pursuit of truth[175] guided by established rules of criminal procedure and evidence, but in practice there are many subjective factors that influence the course of events. Justice may in theory be blind, but in reality the various players making up the justice system are very human and they bring their own perspective, experience, aspirations and fears to the decisions they make.

Traditional analysis involves an examination of each of the principal causes of wrongful convictions. I intend to do that later in this part of the paper, illustrating each by reference to case examples. Before doing that, however, it is important to describe four critical environmental or "predisposing circumstances"[176] that foster wrongful convictions to occur in the first place. They are:

a) public pressure to convict in serious, high profile cases

b) an unpopular defendant, often an outsider and member of a minority group

c) a local legal environment that has converted the adversarial process into a "game," with the result that the pursuit of the truth has surrendered to strategies, maneuvering and a desire to win at virtually any cost

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[175] *Supra.*, footnote 1.

[176] To use a phrase adopted by Dianne L. Martin, *The Police Role in Wrongful Convictions: An International Comparative Study*, an essay edited by Saundra D. Westervelt *et al* in *Wrongly Convicted* (New Brunswick: Rutgers University Press, 2001), at page 83; further discussed in the *Morin Inquiry Report, supra.*, footnote 99 at page 1095.

d) "noble cause corruption:" the belief that the end justifies the means because the suspect committed the crime, and improper practices are justifiable to ensure a conviction.

a) *Public Pressure*

High profile criminal cases, particularly those involving gruesome facts, tend to inflame community passions and create intense pressure on the police to arrest and on prosecutors to convict the persons responsible. This was clearly the case in the IRA pub bombing cases in England during the 1970s.[177]

Public outrage usually translates into media pressure on the police to solve the case. That, in turn, intensifies pressure on the investigators to identify a viable suspect, with speed becoming the overriding factor.[178] Tunnel vision sometimes sets in. The investigative team focuses prematurely, resulting in the arrest and prosecution of a suspect against whom there is some evidence, while other leads and potential lines of investigation go unexplored.[179] It is now clear that that is precisely what occurred in the cases of Morin and Sophonow.[180] The 2002 Illinois Commission's Report on capital punishment said this on the subject:[181]

> Pressure always exists for a police department to solve a crime, particularly where that crime is a homicide...In any investigation, the danger exists that rather than keeping an open and objective

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[177] See *supra*., footnote 60 and accompanying text.

[178] For a discussion of this, see Paul R. Wilson, *When Justice Fails: A Preliminary Examination of Serious Criminal Cases in Australia*, 24 Aust. Journal of Social Issues 3 (1989); Morin Inquiry Report, *supra*., footnote 99 at pages 1136-1138.

[179] An attempt has been made to deal with this in Britain, where under s. 23 (1)(a) of *the Criminal Procedure and Investigations Act*, 1996, a Code of Practice shall be developed to require that "...where a criminal investigation is conducted all reasonable steps are taken for the purposes of the investigation and, in particular, all reasonable lines of inquiry are pursued": http://www.hmso.gov.uk/acts/acts1996/96025--f.htm

[180] The term "tunnel vision" is of recent vintage, perhaps emerging for the first time during the Morin Inquiry. Its origin can be traced back to Judge Frank's 1957 book, *Not Guilty*, *supra*., footnote 22, when he spoke at page 66 of the police rushing to judgment: "See what sometimes happens: a bank has been robbed, its cashier murdered. A bystander reports to the police that he saw William Jones commit the murder. Having thus found a suspect, the police sedulously run down all clues that seem to incriminate William Jones. They piece together these clues and jump to the conclusion that he is their man. They overlook other clues that might exculpate Jones or inculpate someone else. They brush aside facts inconsistent with their theory of Jones' guilt. In this they are not dishonest. For here pride and prejudice operate: Pride in their theory is buttressed against any other. Said former U.S. Attorney General Homer Cummings of a famous case, "The police found their suspect and then proceeded to search for the facts to fit him."

[181] Ryan Report, *supra*., footnote 166 at page 20.

> mind during the investigatory phase, one may leap to a conclusion that the person who is a suspect is in fact the guilty party. Once that conclusion is made, investigative efforts often center on marshaling facts and assembling evidence which will convict that suspect, rather than continuing with the objective investigation of other possible suspects. There is a fine line to be drawn in such circumstances, but where a homicide is concerned and the suspect may be exposed to the penalty of death, it is extraordinarily important that law enforcement agencies avoid "tunnel vision."

Few crimes in recent history – let alone a crime that never occurred – produced as many trials, convictions, reversals, retrials and public pressure as did an alleged gang rape of two white girls by nine black teenagers on a train in Alabama on March 25, 1931.[182] Over the course of the next two decades, the struggle for justice for the "Scottsboro Boys" as they became known, made celebrities out of persons who had previously lived in obscurity, and both launched and ended promising professional careers.

In the depths of the Great Depression, two young girls "hoboed" their way by freight train from Alabama to Tennessee. They met seven white boys who were similarly stealing a ride on the train. There was some evidence that both of the girls were prostitutes, and had engaged in sexual relations with at least one of the white boys. A group of black teens came on the train, and a fight between the two groups ensued. The blacks won, throwing the white boys off the train. The white boys alerted authorities that the blacks were on the train with the two girls, and an armed posse met them at the next train stop. The girls, sensing that they could be charged with vagrancy, claimed that they had been raped by the blacks. Medical evidence undermined their story, but the charges continued. The community was outraged at the apparent brutality of the black boys.

The trial began only 13 days after the alleged offence. All accused were in protective custody. Five National Guard companies consisting of 118 officers surrounded the courthouse as approximately eight thousand people from the area and surrounding counties arrived at the little county courthouse seat in Scottsboro. On the third day of the trial, the judge, hearing reports of a planned lynching,

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[182] Haywood Patterson and Earl Conrad, *Scottsboro Boys* (New York: Doubleday and Company Inc., 1950); the NBC movie "Judge Horton and the Scottsboro Boys;" and see information on this trial at www.law.umkc.edu/faculty/projects/FTrials/scottsboro/SB_HRrep.html The trial of Dr. Sam Sheppard is another classic example of the effect of intense public and media pressure on the trial process. See *infra.*, footnote 408 and accompanying text.

shouted to the crowd that he had no patience with a mob spirit, and that the police guards would shoot to kill if necessary.[183]

The evidence at the trial exculpated the accused. Nonetheless, during his impassioned address to the jury, the prosecutor thundered "guilty or not, let's get rid of these niggers."[184] An all-white jury found them guilty, and all but one were sentenced to death. The trial judge then shocked the community when he allowed the defence's motion to set aside the jury's verdict, and ordered a new trial on the grounds that the girls' evidence was improbable, contradicted and uncorroborated. He was voted out of judicial office the following year.[185]

During the appeals and retrials that followed,[186] all of the defendants were released from prison, and the last surviving Scottsboro Boy was pardoned by Alabama Governor George Wallace in 1976.

b) *An Unpopular Defendant*

Even before evidence is led at trial, members of a jury may see the accused in a negative light – affecting, perhaps imperceptibly, the presumption of innocence, and making the case more vulnerable to a miscarriage of justice. In extreme cases the *practical* burden of proof may actually shift to the accused, and the effectiveness of defence counsel could be impaired through their association with an unpopular accused.[187]

This can occur in several situations:[188] first, where the accused is a member of a minority group, generating among the jury myths and stereotypes of lawlessness and a propensity to commit crimes by that group. Historical examples include

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[183] www.law.umkc.edu/faculty/projects/FTrials/scottsboro/SB_HRrep.html (page 1 of 2); and on the same website see the report on the Scottsboro Case prepared by Miss Hollace Ransdall at page 4 of 12.

[184] Haywood Patterson, *supra.*, at page 13.

[185] www.law.umkc.edu/faculty/projects/ftrials/scottsboro/SB_Bhort.html

[186] Several of the accused reached the Supreme Court of United States on important questions of law: *Powell v Alabama*, 287 U.S. 45 (1932) (adequate assistance of counsel); *Patterson v Alabama*, 294 U.S. 600 (1935); *Norris v Alabama*, 294 U.S. 587 (1935) (blacks on the jury panel).

[187] See, generally, *Attorney for the Damned*: Clarence Darrow, edited and with notes by Arthur Weinberg, with a foreword by Justice William O. Douglas (New York: Simon and Schuster, 1957). For a general discussion of the problems associated with representing an unpopular defendant, particularly the ethical issues arising for counsel, see: "Ethics and Canadian Criminal Law", by The Honourable Michael Proulx and David Layton (Toronto: Irwin Law Inc., 2001), at page 85 – 113).

[188] *Ibid.*

Blacks in the United States, [189] Aboriginals in Canada,[190] and the Irish in England.[191]

Second, those with a radical political, religious or social philosophy are often said to be more vulnerable to selective prosecution and the risk of wrongful conviction.[192]

Those thought to be different from mainstream society form yet a third vulnerable category. The Chamberlain case from Australia, discussed earlier,[193] provides a good illustration. During the trial, membership of the Chamberlains in the Seventh Day Adventist Church was emphasized by many media outlets. The media had a field day in the case, stirring up suspicion against a couple whose demeanor in the face of tragedy they simply could not understand. As one Australian observer, Paul R. Wilson, put it, "most Australians perceive Adventists as an obscure and perhaps bizarre sect who do not eat meat but pray on Saturday – the day all ordinary Australians are watching football."[194] More seriously, it was suggested during the trial that the name "Azaria" was given to the child because it meant "sacrifice in the wilderness." This rumour, perpetuated by some newspapers, persisted even though the Chamberlains steadfastly maintained that the name came from the Bible and meant "blessed of God."[195] Wilson summarized the point in this way:[196]

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[189] Haywood Patterson, *supra.*, footnote 182; and see *Without Sanctuary; Lynching Photography in America*, with a foreword by Congressman John Lewis (Twin Palms Publishers, 2000) [A book that can only be described as *profoundly* disturbing].

[190] See the case of Donald Marshall Jr., *supra.*, footnote 86; *R v Nepoose* (1988), 46 C.C.C. (3d) 421 (Alta. C.A.); *R v Nepoose* (1992), 71 C.C.C. (3d) 419 (Alta. C.A.); and see the discussion of this issue by Dianne L. Martin in *Wrongly Convicted, supra.*, footnote 176 at pages 85-6.

[191] See the discussion of the IRA pub-bombing cases, *supra.*, footnote 60. For a further example, reference can be made to an interesting text prepared by Martin L. Friedland, *The Trials of Israel Lipski* (London: MacMillan London, 1984).

[192] Clarence Darrow, *Attorney for the Damned, supra.*, footnote 187, *Against Prejudice, "The Communist Trial, Chicago 1920"* at page 121 et seq.; see also the IRA prosecutions, *supra.*, footnote 60 and accompanying text; reference can also be made to the *Chamberlain* case, *supra.*, at footnote 44 and accompanying text.

[193] *Supra.* footnote 44 and accompanying text.

[194] Paul R. Wilson, *supra.*, footnote 47 at page 16.

[195] *Ibid.* The name "Azaria" is referred to in the second book of Parilipomenon, c.21:2.

[196] *Ibid.* at page 17.

> Coupled with publicity regarding the name "Azaria," the weird circumstances of the child's disappearance and the emphasis on their religious background the media stereotyped Lindy Chamberlain in particular as a modern-day witch. A jury could not help but be influenced by this stigmatisation process.[197]

Finally, those "from away" are quite often vulnerable. They do not belong to the community where the crime occurred. Their values are unknown. They are sometimes seen as threatening to the local *status quo*. These factors may prompt some to conclude, quite callously, that the defendant is expendable. In the case of the Scottsboro Boys, discussed earlier,[198] the following remarks are attributed to the prosecutor during his closing address to the jury:[199]

> Gentlemen of the jury, I don't say give that nigger the chair. I am not going to tell you to give him the electric chair. You know your duty. I am not going to tell you to give the nigger a life sentence. All I can say is, hide him. Get him out of our sight. Hide them. Get them out of our site. *They are not our niggers*. Look at their eyes, look at their hair, gentlemen. They look like something just broke out of the zoo. (Emphasis added)

c) Conversion of the Adversarial Process into a Game

Prosecuting counsel are entitled to press fully and firmly every legitimate argument tending to establish guilt, but must be accurate, fair and dispassionate in the conduct of the case.[200] Tempered advocacy, not unbridled partisanship, must guide the prosecutor's actions and words.[201] Moreover, a criminal trial is not a personal contest of skill or professional preeminence: prosecuting counsel must resist any notion that the object of the prosecution is to secure a conviction or, put simply, to "win."[202]

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[197] For a detailed account of this, see: John Bryson, *Evil Angels* (New York: Summit Books, 1985).

[198] Haywood Patterson, *supra*., footnote 182 and accompanying text.

[199] *Ibid.* at page 13.

[200] *Pisani v The Queen* (1971) 1 C.C.C. (2d) 477 (S.C.C.) at page 478; *R v Cook* [1997] 1 S.C.R. 1113 at page 1124; *Berger v U.S.*, 295 U.S 78 at page 88 (1985); *R v Chambers* (1990), 59 C.C.C. (3d) 321.

[201] The Honourable Michel Proulx and David Layton, *Ethics and Canadian Criminal Law* (Toronto: Irwin Law Inc., 2001), at page 671.

[202] *R v Boucher* (1954), 110 C.C.C. 263 (S.C.C.) at page 270; recently followed by the Judicial Committee of the Privy Council in *Randall v The Queen*, [2002] 2 Cr. App. R. 17 (P.C.), per Lord Bingham of Cornhill adopted, again, by the Supreme Court of Canada in 2002 in: *R v Regan* (2002), 161 C.C.C. (3d) 97

That is the theory. The practice is often quite different. Consider, for example, the heavy pressures placed upon Crown counsel to win cases as a means of securing career advancement. As two Australians recently have observed:[203] "the most idealistic prosecutor would have few illusions about his future prospects if every person he prosecuted were to be acquitted. This is, perhaps, rarely taken into account at a conscious level but it adds to the overall ethos of rivalry and hence the need to win." A special strength of character is required if Crown counsel is to resist getting too caught up in a "culture of winning" – as evidenced by unethical strategies such as: deliberately withholding important evidence from the defence;[204] inflammatory closing addresses to the jury;[205] expressing a personal opinion about a witness or an issue in the case;[206] alluding to facts that are not properly in evidence; [207] abusive and unfair cross-examination of the accused;[208] and raising a theory inconsistent with facts in evidence.[209]

d) Noble Cause Corruption

The phenomenon known as "noble cause corruption" is said to exist where police believe that it is justifiable to fabricate or artificially improve evidence, or in some other fashion bend the rules to secure the conviction of someone they are satisfied is guilty.[210]

(S.C.C.), at 125; *R v Cook* (1997), 114 C.C.C. (3d) 481 (S.C.C.), at par. 21 *et seq.*; *R v Power* (1994), 89 C.C.C. (3d) 1 (S.C.C.).

[203] J. Hunter and K. Cronin. *Evidence, Advocacy and Ethical Practice: A Criminal Trial Commentary* (Sydney: *Butterworths*, 1995) at 187.

[204] *R v Stinchcombe*, [1991] 3 S.C.R. 326.

[205] *R v Romeo* (1991) 62 C.C.C. (3d) 1 (S.C.C.); *R v Kaufman* (2000), 151 C.C.C. (3d) 566, (Que. C.A.).

[206] *R v Chambers, supra.*, at page 335.

[207] *R v Rose* (1990), 129 C.C.C. (3d) 449 (S.C.C.), at page 494.

[208] *R v Robinson* (2001), 153 C.C.C. (3d) 398 (Ont. C.A.).

[209] *R v Hay* (1982), 70 C.C.C. (2d) 286 (Sask. C.A.); and see the Sophonow Inquiry Report, *supra.*, footnote 124 at pages 49-52. A discussion of the "Game Theory" can be found in Edward D. Radin, *The Innocents, supra.*, footnote 35 at pages 35-6.

[210] John P. Crank and Michael A. Coldero, *Police Ethics: The Corruption of Noble Cause* (Cincinnati: Anderson Publishing Co., 2000); John Kleinig, "*Rethinking Noble Cause Corruption.*" International Journal of Police Science and Management, Volume 4, 2002, pages 287-314; Royal Commission into the New South Wales Police Service, The Honourable Justice James Wood, Supreme Court New South Wales, a paper presented at the 8th International Anti-Corruption Conference at Lima, Peru in September 1997, located at http://www.transparency.org/iacc/8th_iacc/papers/jwood.html; "*Conduct Unbecoming.*" International Anti-Corruption newsletter – October 2002, by the RCMP Canada, located at

It is an ends-based police culture that can manifest itself in many ways: false testimony, excessive force, as well as illegal searches, surveillance or other questionable police strategies. It covers a broad range of conduct that masks itself as legitimate on the basis that the guilty must be brought to justice despite evidentiary, substantive or constitutional considerations that could "get in the way." The danger of this philosophy is obvious. The innocent may become enmeshed in a finding of guilt based on nothing more than a firmly held moral value or police theory. This philosophy *affects* police services all over the world and has the capacity to *infect* virtually any criminal investigation.

e) Recommendation: Reshaping Attitudes, Practices and Cultures within the Criminal Justice System

Scholars have tended to believe that the most effective remedies and reforms lie at the front end of the system: their recommendations generally focus on systemic process issues such as disclosure, interviewing of witnesses, eyewitness identification, and so on. To be sure, those are important issues and I will deal with them later on.

I start, however, with a much more fundamental issue: the reshaping of attitudes, practices and cultures within the criminal justice system. In that context, a clear understanding of the role of the prosecutor is absolutely critical to the fair functioning of our system.

In *Boucher v The Queen,*[211] Rand, J. emphasized that the duty of prosecuting counsel is not to obtain a conviction at all costs, but to act as a minister of justice. His statement has attained nearly classical dimensions, and in 2002 was quoted with approval by Lord Bingham in a decision of the Judicial Committee of the Privy Council (U.K.): [212]

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www.icac.org.hk/text/eng/newsl/issue4/rcmp.html The phrase "Noble Cause Corruption" does not have a long history. Its origins are often wrongly attributed to Sir John Woodcock, Chief Inspector of Constabulary in England and Wales, in 1992. As a term, "Noble Cause" corruption actually entered the literature with Edwin Delattre's influential book, *Character and Cops: Ethics in Policing*, first published in 1989: See John Kleinig, *supra.*, in his footnotes 18 and 19.

[211] (1954), 110 C.C.C. 263 (S.C.C.), at page 270.

[212] *Randall v The Queen*, [2002] 2 Cr. App. R. 17 (P.C.). Similar sentiments have been expressed in the United States: *Berger v U.S.*, 295 U.S. 78, 88 (1935), and in 2002 the Supreme Court of Canada re-affirmed that *Boucher* expresses the "seminal concept of the Crown as 'Minister of Justice'": *R v Regan* (2002), 161 C.C.C. (3d) 97 (S.C.C.), at 125.

> It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings.

Lord Bingham discussed the evidentiary and procedural rules that have governed criminal trials for centuries, and then added the following cautionary note:[213]

> It cannot be too strongly emphasized that these are not the rules of a game. They are rules designed to safeguard the fairness of proceedings brought to determine whether a defendant is guilty of committing a crime or crimes, conviction of which may expose him to serious penal consequences. In a criminal trial as in other activities the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse.

Prosecution agencies, judicial councils and defence associations should establish and regularly deliver training courses specifically designed to help prevent wrongful convictions. Templates presently exist. On March 27th, 2002, the Canadian Judicial Council voted unanimously to authorize the National Judicial Institute to create and deliver an intensive three day course to help Canadian Judges identify and counteract known and suspected causes of wrongful convictions.[214] In the United States the Innocence Project has developed a 13 part academic course on wrongful convictions for use in universities, colleges and law schools.[215] Both Ontario and Manitoba have held similar seminars, the latter province hosting the "Jailhouse Confession and Tunnel-vision Conference" in September, 1999.[216]

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[213] *Ibid.*

[214] *The Lawyers Weekly*, Volume 21, April 12, 2002 at page 1.

[215] See *infra.*, footnote 391.

[216] See the recommendations of Justice Kaufman in the Morin Inquiry Report, *supra.*, footnote 99 at page 1134.

Deeply rooted attitudes, practices and culture are difficult to change, but there are several specific initiatives which, if undertaken well, can assist in a reshaping process over time:

i. *Tunnel vision*: raising awareness of the simple existence of this phenomenon is critical. Police and prosecutors' seminars should openly discuss and confront the issue. During an investigation, even where a viable suspect has been identified, police should continue to pursue all reasonable lines of enquiry, whether they point toward or away from the suspect.[217] When possible, the prosecutor ultimately assuming responsibility for the trial should not be the one who worked with, or advised, the police during the pre-charge phase, to ensure that "fresh eyes" are brought to the case. Finally, as prosecution decisions based on sound legal analysis can be publicly unpopular, it is important that the culture within the senior ranks of the prosecution office be supportive of the independent and quasi-judicial role of the prosecutor.

ii. *Avoiding the "game" theory of criminal prosecutions*: Again, raising awareness is critically important. Ethical responsibilities of both the defence and prosecution should be emphasized at law schools, and re-emphasized in practice as part of continuing legal education programs.[218] The link of this dangerous trial philosophy to existing and past miscarriages of justice is important to understand.[219] Healthy working relationships involving prosecution and defence counsel *outside* of the adversarial process and casework is very useful: for instance, jointly planned and presented professional development seminars can assist in breaking down destructive barriers, and enhancing positive lines of communication. The media should be involved as well: sometimes a common "enemy" assists in bringing parties together. Bench and bar liaison committees also

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[217] The latter recommendation derives from recent legislative initiatives in Britain: C.P.I.A. (Code of Practice), *supra.* footnote 179 at s. 23 (1)(a); recently adopted by the Commission on Capital Punishment, presented to Illinois Governor George Ryan in 2002: *supra.*, footnote 166 at page 20. Generally, see: Morin Inquiry Report, *supra.*, footnote 99; Sophonow Inquiry Report, *supra.*, footnote 124; Meissner & Russano, *infra.*, footnote 221 at 56.

[218] An excellent textbook has just been published in this area: *Ethics and Canadian Criminal Law*, by the Honourable Michel Proulx and David Layton (Toronto: Irwin Law Inc., 2001).

[219] The Innocence Project has developed a thirteen-part academic course on wrongful convictions for use in universities, colleges and law schools. It includes a fifteen hour, 14 lecture digital multimedia curriculum on CD, also available separately for training and educational purposes: www.innocenceproject.org/about/course.php

serve to act as a constructive forum to discuss irritants and emerging trends.

iii. *Police Culture*: Police services should endeavour to foster within their ranks a culture of policing that values the honest and fair investigation of crime, and the protection of the rights of all suspects and accused. Management must recognize that it is their responsibility to foster this culture. This must involve, at the least, ethical training for all police officers.[220]

Additionally, rather than relying on traditional safeguards and protective filters throughout the criminal justice system – such as prosecutorial review, committal proceedings and the trial process – police need to develop and maintain a culture that guards against early investigative bias, and emphasizes the importance of fact verification throughout the full investigation.

iv. *Adherence to Standards Set by the International Association of Prosecutors (IAP):* IAP was formed in 1995, and now has over 1,300 individual members and over 75 organizational members representing 127 countries. Its goal is to promote high standards in the administration of criminal justice, and to guard against miscarriages of justice. It meets annually, issues publications and researches issues of relevance to prosecutors. An early development for the association was the promulgation of standards. The standards emphasize: independence from political interference; impartiality; a fair trial; not relying on illegally-obtained evidence; a cooperative and collegial relationship with defence counsel, police and the courts; and the empowerment of prosecutors to carry out their responsibilities by protecting them against arbitrary government action, as well as legal liability and personal protection against threats and intimidation. These standards can be found at: www.iap.nl.com

2) Immediate Causes

Miscarriages of justice are caused by a wide variety of factors. Some involve a decision by the police or prosecutor to seek a conviction of the defendant despite a

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[220] This recommendation finds its origins in the Morin Inquiry Report, *supra.*, footnote 99 at page 1191, and was adopted in the Report to Governor George Ryan of Illinois, *supra.*, footnote 166 at page 45 (footnote 5 and accompanying text at page 21).

proper evidentiary basis demonstrating guilt. Some are the result of negligence, recklessness or misconduct on the part of authorities. Others are the result of a well-intentioned but misguided error that anyone might make. Often, multiple causes interact in a single case, and fuel each other into a wrongful conviction.

Nurtured and supported by the environmental factors outlined above, the principal causes of wrongful convictions are:[221]

a) eyewitness misidentification
b) police mishandling of the investigation
c) inadequate disclosure by the prosecution
d) unreliable scientific evidence
e) criminals as witnesses
f) inadequate defence work
g) false confessions
h) misleading circumstantial evidence

Other factors that are either less prevalent or about which less is known include: judicial errors, inadvertent witness error, perjury, inadequate consideration of alibi evidence and insufficient defence resources.

a) Eyewitness Misidentification

The single most important factor leading to wrongful convictions is eyewitness misidentification.[222] The danger associated with this evidence is that it is

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[221] The order chosen for this list is intended to reflect both prevalence and the potential for impact on a case. It cannot be stressed enough that these causes usually arise in combination, and a single factor rarely emerges as the *sole* cause in a particular case. For a discussion of this point, see Christian A. Meissner and Melissa B. Russano, *The Psychology of Interrogations and False Confessions: Research and Recommendations*, 1 Can. Journal of Police and Security Services 53 (2003).

[222] *People v Wade*, 388 U.S. 218 (1967) at 227; *U.S.A. v Burns* (2001), 151 C.C.C. (3d) 97 (S.C.C.) at par. 116; *Kelleher v The Queen* (1974), 131 C.L.R. 534 (H.C.) at 550-1; *Bromley v The Queen* (1986), 161 C.L.R. 315 (H.C.) at par. 9; *R v Turnbull*, [1977] Q.B. 224; *R v Burke* (1996), 105 C.C.C. (3d) 205 (S.C.C.), at 224; *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.) at page 450-51; Edwin M. Borchard, *supra*., footnote 2 at page 367; Edward D. Radin, *supra*., footnote 35 at page 232; Steven Wisotsky, *Miscarriages of Justice: Their Causes and Cures*, 9 St. Thomas L. Rev. 547 (1997) at page 552 – 553; Garry L. Wells *et al*, *Eyewitness Identification Procedures, Recommendations for Line-Ups and Photospreads*, *22 Law and Human Behaviour*, 603 (1998); Arye Rattner, *supra*., footnote 2 at page 292; John Turtle *et al*, *Best Practice Recommendations for Eyewitness Evidence Procedures*, 1 Can. J. of Police and Security Services 5 (2003); additionally, Dr. Elizabeth Loftus testified to this effect before Commissioner Cory in the Sophonow Public Inquiry. At page 33, Commissioner Cory recommended that trial judges instruct juries along these lines: "The trial judge should stress that tragedies have occurred as a result of mistakes made by honest, right-thinking eye witnesses. It should be explained that the vast majority of the wrongful convictions of innocent persons have arisen as a result of faulty eyewitness identification:" see *supra*., footnote 124 at page 33.

deceptively credible, largely because it is both honest and sincere.[223] The dramatic impact of this type of evidence taking place in court, before the jury, can aggravate the distorted value that the jury may place on it.[224] Dr. Elizabeth Loftus, an acknowledged expert in the area,[225] argues powerfully that in terms of impact on a jury 'there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says 'that's the one!'"[226]

The well-documented case of Jennifer Thompson, who, as a 22-year-old college student was raped at knifepoint, provides an excellent example:[227]

> During my ordeal, some of my determination took an urgent new direction. I studied every single detail on the rapist's face. I looked at his hairline; I looked for scars, for tattoos, for anything that would

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[223] *R v Hibbert* (2002), 163 C.C.C. (3d) 129 (S.C.C.), at par. 50; *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.) at page 451; *R v Wristen* (1999), 141 C.C.C. (3d) 1 (Ont. C.A.) [Not only should the trial judge charge the jury with respect to the inherent frailties of identification evidence, but should go further by pointing out that mistaken identification has been responsible for miscarriages of justice.]

[224] *Ibid.*

[225] Dr. Loftus has a Ph. D. in psychology from Stanford University; is an Adjunct Professor of law at the University of Washington; has received four honourary Doctorates in the United States, England and Europe; is the author of numerous books, articles and chapters on psychological issues, particularly as they relate to memory and the psychology of eyewitness testimony. Dr. Loftus testified as the lead psychological expert at the Sophonow Inquiry on wrongful convictions before Commissioner Cory: see footnote 124, and the accompanying text. In the United States, the Ryan Commission Report on capital punishment, *supra.*, footnote 166, also reached a similar conclusion at page 31.

[226] Dr. Elizabeth Loftus, *ibid.* at page 19; *R v Atfield* (1983), 25 Alta. L.R. (2d) 97 (C.A.); *R v Izzard* (1990), 54 C.C.C. (3d) 252 (Ont. C.A.) at 255; Steven Wisotsky, *infra.*, footnote 373 at page 553; Edward D. Radin, *supra.*, footnote 35 at page 85.

[227] Ms Thompson has publicly spoken and testified on the issue of eyewitness fallibility. The Internet is replete with stories on her experience, for instance: "I Was Certain, but I Was Wrong", by Jennifer Thompson, published on the 18th of June 2000, in the *New York Times* (http://faculty.washington.edu/gloftus/Other_Information/Legal_Stuff/Articles/News_Articles/Thompson_NYT_6_18_2000.html); "What Jennifer Saw", Frontline Show aired on the 25th of February 1997, on PBS (http://www.pbs.org/wgbh/pages/frontline/shows/dna/etc/script.html); "Wrongly convicted man and his accuser speak at Law School, by Rachel Madearis, published on the 22nd of October 2001, in the University News (http://www.google.ca/search?q=cache:8fNTkJOHPMAJ:www.unews.com/news/2001/10/22/News/Wrongly.Convicted.Man.And.His.Accuser.Speak.At.Law.School-130192.shtml+%22wrongly+convicted+man%22&hl=en); "Forensic Science: Scoping out eyewitness Ids", by Mark Hansen, 87 A.B.A.J. 39 (2001), cited as: http://nersp.nerdc.ufl.edu/~malavet/evidence/notes/thompson_cotton.htm; Jennifer Thompson's biography is also set out at: http://www.law.harvard.edu/academics/clinical/cji/innconf02/bio-thompsonj.htm; "What Jennifer Saw" by Elizabeth Loftus (http://www.pbs.org/wgbh/pages/frontline/shows/dna/interviews/loftus.html).

> help me identify him. When and if I survived the attack, I was going to make sure he was put in prison and he was going to rot.
>
> When I went to the police department later that day, I worked on a composite sketch to the very best of my ability. I looked through hundreds of noses and eyes and eyebrows and hairlines and nostrils and lips. Several days later, looking at a series of police photos, I identified my attacker. I knew this was the man. I was completely confident. I was sure.
>
> I picked the same man in a lineup. Again, I was sure, I knew it. I had picked the right guy, and he was gong to go to jail. If there was the possibility of a death sentence, I wanted him to die. I wanted to flip the switch.
>
> When the case went to trial, I stood up on the stand, put my hand on the Bible and swore to tell the truth. Based on my testimony, Ronald Cotton was sentenced to prison for life. It was the happiest day of my life because I could begin to put it all behind me.

Eleven years later, DNA testing showed that Ronald Cotton had not committed the offence. Another man, one Bobby Poole, eventually pleaded guilty, and was sentenced to a term of imprisonment. Thompson and Cotton have since become close friends, and both regularly lecture on the risk of wrongful conviction through eyewitness misidentification.[228]

The identification evidence of well-meaning and otherwise honest witnesses can become tainted in a number of ways:

- Investigators' "feedback" to the witness after the identification (whether a photo spread or line-up), even in casual conversation, may have the effect of inflating the witness's confidence in his or her identification, later affecting the witness's testimony in court.[229]
- Suggestive photo spreads or line-ups, where the suspect stands out.[230]

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[228] *Ibid.*

[229] George Castelle and Elizabeth Loftus, "*Misinformation and Wrongful Convictions*", an essay in *Wrongly Convicted: Perspectives on Failed Justice* (New Brunswick: Rutgers University Press, 2001), at page 25; Sophonow Inquiry Report, *supra*, footnote 124 at page 28; John Turtle *et al, supra.*, footnote 222 at page 12.

[230] Sophonow Inquiry Report, *supra.*, at page 24; *R v Harvey* (2001), 160 C.C.C. (3d) (Ont. C.A.) at par. 14, affd. 169 C.C.C. (3d) 576 (S.C.C.).

- Witness sees the suspect's photograph, or a composite sketch, in the media.[231]
- A weapon focus: witness concentrates on and remembers the weapon used in the crime, to the exclusion of other important details.[232]
- Susceptibility to post-event information, over a period of time, can create a false recollection in a witness.[233]
- Multiple witnesses who participated in the preparation of a composite drawing may have an opportunity to influence one another's recollection.[234]
- The investigators may leave the impression that the suspect is, in fact, in one of the photos, or is one of the persons in the line-up. The only question left is: which one?[235]
- A "show-up" in a courthouse, police station or other similar circumstance may leave an impression that the person seen is there because of some violation of the law.[236]
- Showing a *single* photo to the witness often influences later identification evidence in court: the witness has stamped on his memory the face he saw in the photo, rather than the face he saw on the occasion of the crime.[237]
- "In-dock" identification, by its very nature, is weak and undesirable.[238]

A recent case in Canada shows how inappropriate steps by police in the identification process can cause irreversible prejudice to an accused.[239] In 1993, a 12-year-old girl was walking home alone through a field when she was suddenly

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[231] Sophonow Inquiry Report, *supra.*, at page 29.

[232] Sophonow Inquiry Report, *supra.*, at page 27.

[233] Sophonow Inquiry Report, *supra.*, at page 28.

[234] Sophonow Inquiry Report, *supra.*, at page 29.

[235] Sophonow Inquiry Report, *supra.*, at page 31.

[236] Ruth Brandon and Christie Davies, *supra.*, footnote 38 at page 31; *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.) at page 456 – 457.

[237] *R v Goldhar* (1941), 76 C.C.C. 270 (Ont. C.A.); *R v Armstrong* (1959), 125 C.C.C. 56 (B.C.C.A.); *R v Faryna* (1982), 3 C.C.C. (3d) 58 (Man. C.A.); *R v Proulx* (1992), 76 C.C.C. (3d) 316 (Que. C.A.); *R v Biddle* (1993), 86 C.C.C. (3d) 269 (Ont. C.A.), revd. on other grounds 96 C.C.C. (3d) 321 (S.C.C.); *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.).

[238] *R v Izzard* (1990), 54 C.C.C. (3d) 252 (Ont. C.A.) at page 256; *R v Nguyen* (2000), 35 C.R. (5th) 245 (Ont. C.A.); *R v Cuming* (2001), 158 C.C.C. (3d) 433 (Ont. C.A.); "Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases" (U.K.: 1976) (quoted in *R v Izzard*, supra.); "In The Dock – An Overview of the Decisions of the High Court on Dock Identifications in the Magistrates Court," by Tony Watkin, [2003] *Crim. L.R.* 463.

[239] *R v Miaponoose* (1996), 110 C.C.C. (3d) 445 (Ont. C.A.).

attacked and sexually assaulted by a stranger. The victim immediately told her parents, and they called police. The victim gave the investigators a verbal description of her assailant.

Police located a suspect, and made arrangements for the victim to view him as he passed by her in a police van. The victim identified the (suspect) passenger as the assailant. She then gave her first and only statement to police. She did not see the accused again until the preliminary inquiry. At trial, she again identified the passenger as her assailant. The accused was convicted at trial, and appealed on the basis that the evidence concerning identification was insufficient.

In the Court of Appeal, the Court noted the "inherent frailties of identification evidence",[240] and observed that evidence of this nature "is most likely to result in a wrongful conviction (even) where multiple witnesses have identified the same accused".[241]

On the facts of the case, the Court concluded that the pre-trial identification procedure "was totally unjust in the circumstances".[242] Finding "grave prejudice to the accused"[243] and, indeed, significant prejudice to the victim and the community as a whole,[244] the Court allowed the appeal, quashed the conviction and entered an acquittal on the basis that "the inappropriate pre-trial identification procedure adopted in this case rendered the complainant's identification of the appellant very dubious and of very little weight".[245]

Recommendations

Because eyewitness misidentification is the single most important factor leading to wrongful convictions, I think it important to outline some steps that can reduce the risk posed by often well-meaning witnesses.[246]

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[240] *Ibid.* at page 450.

[241] *Ibid.* at pages 450-1.

[242] Ibid. at page 456.

[243] *Ibid.* at page 457.

[244] *Ibid.* at page 457 (on the basis that the victim could no longer testify against this accused in any further proceeding).

[245] *Ibid.* at page 458.

[246] See the discussion of this issue, *supra.*, at footnote 226.

Before doing that, however, I would like to point out that in 1999 the National Institute of Justice[247] published the booklet *Eyewitness Evidence: A Guide for Law Enforcement*.[248] It contains detailed recommendations on witness interviews, photospreads (mug books), composite images, show-ups, lineups and the recording process throughout. It is an excellent publication, and has been received favorably by a number of authorities.[249]

Seven core rules can reduce the risk of an eyewitness contributing to the conviction of someone who is factually innocent. They are:[250]

1. An officer who is independent of the investigation should be in charge of the lineup or photospread. The officer should not know who the suspect is – avoiding the possibility of inadvertent hints or reactions that could lead the witness before the identification takes place, or increase the witness' degree of confidence afterward.

2. The witness should be advised that the actual perpetrator may not be in the lineup or photospread, and therefore they should not feel that they must make an identification. They should also be told that the person administering the lineup does not know which person is the suspect in the case.

3. The suspect should not stand out in the lineup or photospread as being different from the others, based on the eyewitness' previous description of the perpetrator, or based on other factors that would draw extra attention to the suspect.

4. At the time of the identification, and certainly prior to any possible feedback, the witness should be asked to describe, in his or her own words, how *certain* the witness is that the person identified is the real culprit.[251]

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[247] A component of the Office of Justice Programs, which is the research and development agency of the U.S. Department of Justice.

[248] This 43-page booklet was developed and approved by a multi-disciplinary working group from the United States and Canada. The group consisted of: police officers; defence counsel; prosecutors; university professors and scholars; sheriff's officers; public defenders; and private practitioners. It can be found at: http://www.ncjrs.org/pdffiles1/nij/178240.pdf

[249] Ryan Commission Report, *supra.*, footnote 166 at page 35; Castelle and Loftus, *Wrongly Convicted, supra.*, footnote 176 at page 26; Keith A. Findley, *supra.*, footnote 2 and accompanying text; *Innocence Project*, www.innocenceproject.org/causes/mistakenid.php; John Turtle *et al*, *supra.*, footnote 222 at page 5.

[250] These recommendations are based in part on Gary L. Wells, *supra.*, footnote 222, which were adopted by the Ryan Commission, *supra.*, footnote 166; see also John Turtle *et al*, *supra.*, footnote 222, and Steven Penrod, "Eyewitness Identification Evidence," 18 *Criminal Justice* 37 (2003).

5. If the identification process occurred on police premises, the witness ought to be escorted out promptly on completion of the lineup, to avoid witness contamination through contact with other witnesses or officers involved in the investigation.

6. Show-ups[252] should be used only in rare circumstances, such as when the suspect is apprehended near the crime scene shortly after the event.

7. A photospread should be provided *sequentially* and not as a package, thus preventing "relative judgments."

There is one further step that will be helpful. Wherever reasonably practicable the identification process, whether by photograph, lineup or composite, should be recorded throughout, preferably by videotape but, if not, by audio tape.[253]

These reforms do not require new legislation, nor are they particularly resource-intensive. They can be accomplished through policy changes by local authorities as part of a strategy to fight crime *and* ensure that justice is truly done.

b) Police Mishandling of the Investigation

The police investigation is often at the heart of a wrongful conviction because the police gather the evidence, identify the prime suspect, build the evidentiary foundation for conviction, and then testify in support of the prosecution.[254]

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[251] This is particularly useful if a weak identification at the time solidifies into a strong identification at the trial. This state of affairs may suggest that the witness has received some form of post-event information; see John Turtle *et al*, *supra*., footnote 222 at page 11.

[252] A "show-up" involves the physical presentation of a single suspect to a witness during the pre-trial investigation – by, for instance, arranging for an "accidental" encounter on the street, or attending a court appearance of the accused.

[253] I can't resist the temptation to note that this recommendation mirrors one advanced by Edwin M. Borchard, the Dean in this area, some 70 years ago. Obviously, we haven't progressed as much as we should have. In 1932, he said: "Dean Wigmore has suggested a more scientific method, based on the psychology of recognition, for effecting identifications. He proposes the use of the talking film, by which body, motions, and voice of the subject shall be recorded in numerous poses, the pictures then to be presented to viewers in a series of perhaps 25 similar films, selected from a classified stock of 100 types of men and women on file..." *supra.*, footnote 2, at pages 367-8.

[254] Generally, see A. A. S. Zuckerman, *Miscarriage of Justice – A Root Treatment*, [1992] Crim. L. R. 323; recognizing, of course that wrongful convictions are often caused by a multitude of factors: see a discussion of this, *infra.*.

As we have seen, police identification procedures can render the evidence of a key witness useless; tunnel vision can collapse the focus of the investigators to a single suspect – ignoring other avenues; inadequate police disclosure to the Crown may impede necessary disclosure to the defence; and oppressive interrogation techniques can lead to mistaken if not false confessions to the police. I have dealt with these issues elsewhere in this paper, and will not repeat them here.

In many cases, more than a single element plays a role in the conviction. The following is a classic example.

In the case of Thomas Sophonow,[255] police investigators assembled a photo line-up in which Sophonow clearly stood out.[256] The investigators knew that the photo spread was unsatisfactory, yet used it to obtain a very tentative identification from two key witnesses.[257] In his subsequent review of the case, Commissioner Cory[258] said: "If a proper photo pack had been presented, there may not even have been such a tentative identification of Thomas Sophonow and his investigation might have been brought to an end right then."[259] Regrettably, it wasn't.

The investigators then went to Vancouver and confronted Sophonow with the flawed photo spread. They also interrogated him. A transcript of the interview was not verbatim. It was never presented to Sophonow for comment, despite existing practice to do so. More importantly, Cory said: "a strip search and a body cavity search for drugs in the midst of the interview was demeaning, degrading and

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[255] Sophonow Inquiry Report, *supra.*, footnote 124 and accompanying text, and see the various law reports of the case:

R v Sophonow (No. 1) (1983), 6 C.C.C. (3d) 394 (Man. Q.B.) [evidentiary ruling in the second trial]
R v Sophonow (No. 2) (1983), 6 C.C.C. (3d) 396 (Man. C.A.) [media publication pending appeal against conviction]
R v Sophonow (1984), 12 C.C.C. (3d) 272 (Man. C.A.), affd. 17 C.C.C. (3d) 128 (S.C.C.) [appeal against conviction in the second trial]
R v Sophonow (No. 2) (1986), 25 C.C.C. (3d) 415 (Man. C.A.) [appeal against conviction in the third trial]
The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation (Commissioner: the Honourable Peter de C. Cory, Province of Manitoba, Sept. 2001), at website: http://www.gov.mb.ca/justice/sophonow/index.html, last accessed December 16, 2004.

[256] Sophonow Inquiry Report, *supra.*, footnote 124 at page 90.

[257] *Ibid.* at page 90.

[258] Commissioner Cory is a former Judge of the Supreme Court of Canada (1989 to 1999). Prior to that, he had been a trial judge, and in 1981 was appointed to the Ontario Court of Appeal.

[259] *Ibid.* at page 90.

humiliating. It was unnecessary and undertaken, in my view, solely for the purpose of humiliating Thomas Sophonow."[260]

The principal investigating officers made suggestions to Sophonow about how the door at the crime scene had been locked – and when Sophonow subsequently reenacted that process to police, their evidence of his "knowledge" of the locking mechanism was tendered before the jury.[261] The evidence, of course, had no weight whatsoever, and ought not to have been tendered before the jury.

The police investigators also "agreed that they (had been) playing "mind games" with Thomas Sophonow and that they too told untruths and part truths in an unsuccessful attempt to obtain a confession. It is noteworthy that their interrogation was so intense and compelling that Thomas Sophonow came to believe that he had actually committed the murder."[262]

Commissioner Cory arrived at these critical conclusions: [263]

> It may very well be that, if these deliberate actions of the police had not been taken, there would have been no case to put forward against Thomas Sophonow. Thus, from the very outset, by far the greatest responsibility for this tragic miscarriage of justice must fall upon the investigating officers...
>
> There can be no doubt of the devastating and traumatic effect that the first interview by the investigators had upon Thomas Sophonow. No actor, however skillful and experienced, could have portrayed Thomas Sophonow's tortured reaction to his recollection of it. He was clearly deeply disturbed by it. I have no doubt that he was completely traumatized by that interview and that the memory of it has haunted him from that day to this.

These factors alone may have been enough to create an unfair trial. But it didn't stop there. Jailhouse informants were called – one of whom had a previous conviction for perjury.[264] Tunnel vision had set in on the investigators. Alibi

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[260] *Ibid.*

[261] *Ibid.*

[262] *Ibid.* at page 91.

[263] *Ibid.*

[264] *Ibid.* at page 69.

evidence, later shown to be true, was discounted. The Crown and police quickly concluded that there was no evidence to support the defence;[265] and significant information that could have affected the course of the trial was not disclosed by Crown counsel to the defence.[266] That, then, takes me to the next cause of wrongful convictions.

c) Inadequate Disclosure by the Prosecution

Our criminal justice system uses a strikingly asymmetrical process for the sharing of pre-trial information. The prosecution is required to provide the accused with exculpatory information,[267] while the accused bears absolutely no burden to disclose incriminating information to the prosecution.[268] This system may work well when the accused actually committed the crime. There, the accused knows more about the crime than the prosecution. But if the accused had nothing to do with the offence, the Crown and police have an overwhelming advantage in terms of information about the crime. That heightens the importance of adequate disclosure – as it is the factually innocent that stand to suffer the most when exculpatory information, usually not known to the accused, is withheld.

In practice, defendants often do not even learn about information that was withheld from them. On occasion, it emerges in appeals against conviction,[269] and, less commonly, in post-conviction relief proceedings such as applications under section 696 of the *Criminal Code* (formerly section 690),[270] or Commissions of Inquiry that have been called into a wrongful conviction.[271]

Inadequate disclosure sometimes is viewed as something in the nature of a procedural flaw, not affecting the fairness of the trial, such as a breach of a rule of

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[265] *Ibid.* at page 58-9.

[266] *Ibid.* at page 81.

[267] *R v Stinchcombe*, [1991] 3 S.C.R. 326; *R v C* (M.H.), [1991] 1 S.C.R. 763; *R v Chaplin* (1995), 96 C.C.C. (3d) 225 (S.C.C.).

[268] Though timely disclosure of an alibi is expected by the courts: *R v Cleghorn* (1995), 100 C.C.C. (3d) 393 (S.C.C.). And on occasion recommendations have been made for some form of mutual disclosure. In 1996, Britain required disclosure of the defence to the charge in certain circumstances: *Criminal Procedure and Investigations Act*, 1996, s. 5(6). [www.hmso.gov.uk/acts/acts1996/96025--m.htm]

[269] *R v Dixon*, [1998] 1 S.C.R 244; *R v C* (M.H.) *supra*.

[270] Reference re: *Milgaard* (Can.) (1992), 71 C.C.C. (3d) 260 (S.C.C.) [a previously unknown serial rapist lived in the vicinity of the crime].

[271] Sophonow Inquiry Report, *supra*., footnote 124.

practice or, more seriously, a breach of ethics.[272] Placed on this footing, inadequate disclosure rarely serves to defeat a prosecution, though it may pave the way to a disclosure order and an adjournment,[273] or an order permitting the defence to recall certain witnesses for examination or cross-examination.[274]

It can, however, be viewed quite differently. Where both the Crown and defence have had a full opportunity to present whatever evidence they feel is appropriate, the adversarial system usually provides a satisfactory result. However, when the accused through inadequate disclosure is *precluded from changing the course of the trial* because, for instance, a line of questioning could not be pursued in cross-examination,[275] or a witness was not called,[276] or the credibility of a key witness could not be impeached,[277] the risk of wrongful conviction increases significantly. In extreme cases, where the prejudice to the accused's ability to make full answer and defence is irremediable, a stay of proceedings or a declaration that a mistrial has occurred may be the only appropriate remedy.[278]

The best insight into the effect of inadequate disclosure emerges in the reports prepared following the public inquiries called into wrongful convictions in Canada, Australia and New Zealand.[279]

One example will suffice: the case of Thomas Sophonow.[280] On the basis of the evidence of defence and Crown counsel who had appeared at Sophonow's three trials, it became evident that critical reports and evidence in the possession of the Crown had not been disclosed to the defence. Included were: a polygraph operator's report concerning the reasons for which a jailhouse informant came

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[272] *R v Stinchcombe, supra.*.

[273] *R v O'Connor*, [1995] 4 S.C.R. 411.

[274] *Ibid.*

[275] See, for instance, the discussion of the public inquiry into the case of Thomas Sophonow, *supra.*, footnote 124.

[276] *R v Hutter* (1993), 86 C.C.C. (3d) 81 (Ont. C.A.).

[277] *R v C* (M.H.), *supra.*.

[278] *R v O'Connor, supra.*; *R v Dixon, supra.*; *R v McAnespie*, [1993] 4 S.C.R. 501. Likewise, in the United Kingdom, "an accused's right to fair disclosure is an inseparable part of his right to a fair trial": *R v Brown*, [1995] 1 Cr. App. R. 191 at 198 (C.A.); apparently, to the same effect, see: *R v Taylor* [2003] NZCA 304 (CA) at pars. 22 and 26.

[279] Discussed earlier: see footnote 44 and accompanying text.

[280] *Supra.*, footnote 124.

forward to testify against Sophonow; a taped interview of another jailhouse informant which demonstrated that he was a regular police informant, and a further report on the same witness that "operat(ed) as a complete denial of everything that he had said at the third trial; the report of an earlier mistaken identification of the key Crown eyewitness; a police report describing the process by which several Crown witnesses had been placed under hypnosis; the existence of an exhibit that tended to support the accused's defence of alibi; the existence of a second photo line-up which, if it had been available to the defence, would have nullified the rebuttal evidence tendered by the Crown at the third trial." Commissioner Cory found that all of this evidence had been "withheld," and that the three Crown counsel involved must bear responsibility.[281] He added that the withholding of this evidence, in particular, constituted a "serious error" which led to unfair consequences for Sophonow.[282]

Cory concluded that the cumulative damage occasioned by all of these non-disclosures was "irreparable," adding:[283]

> In summary, it is clear that there was a great deal of very significant material that Crown counsel agreed should have been disclosed to defence counsel. It was not. There can be no doubt that, if this material had been disclosed, it may have had a significant effect on the trial process. Crown counsel must bear the responsibility for these omissions.

In recent years, the importance of disclosure has been repeatedly recognized by the Courts in Canada,[284] and by Parliament in the United Kingdom,[285] allowing both to move to a position of virtual "open-file discovery."[286]

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[281] Sophonow Inquiry Report, *supra.*, footnote 124 at pages 75-83.

[282] *Ibid.* at page 81.

[283] *Ibid.* at page 83.

[284] *Supra.*, footnote 267.

[285] *Criminal Procedure and Investigation Act*, 1996 [available at www.hmso.gov.uk/acts/acts1996/96025--m.htm].

[286] Stanley Z. Fisher, *The Prosecutor's Ethical Duty to Seek Exculpatory Evidence in Police Hands: Lessons from England*, 68 *Fordham L. Rev.* 1379 (2000).

d) Unreliable Scientific Evidence

There are four problems with impartial forensic experts. Sometimes, it appears, they are not terribly impartial. Some are far from expert. On occasion, their evidence may be seen as virtually infallible, having more weight than it deserves, with the result that the evidence distorts the normal fact-finding process at trial. Finally, sometimes objective sciences such as DNA later show that the opinion tendered in evidence was simply wrong.[287]

In 1993, the Supreme Court of Appeals of West Virginia made an extraordinary order. It appointed a retired judge to preside over a Special Investigation into the work of the Serology Division of the West Virginia State Police Crime Laboratory. The investigation focused on the work of Fred S. Zain, a Serologist and State Trooper employed within the Serology Division.

Zain had worked in the division for 12 years, from 1977 until 1989. Shortly after his appointment, he was promoted to Head of Serology and rapidly rose through the State police ranks from trooper to corporal to sergeant, and ultimately to lieutenant. During his career, Zain tested physical evidence and testified to the results in 11 states. He was, as one author has noted, "a forensic science superstar."[288] He was able to find flecks of blood and smudges of semen where his colleagues found nothing. He was much in demand by prosecutors, as he was able to convert hopeless cases into a prosecutor's dream.[289]

It was, however, a massive fraud. In an unprecedented opinion, the West Virginia Supreme Court of Appeals adopted the findings of its Special Investigator, stating:[290]

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[287] The "enormous utility and power of DNA evidence" was noted by the Supreme Court of Canada in *R v B (S.A.)* (2003), 178 C.C.C. (3d) 193 (S.C.C.), at par. 51. In 1998 the Parliament of Canada enacted legislation establishing a national DNA databank, and empowered judges to require an offender to submit his or her DNA profile to the bank and, on cause, require a suspect to provide a bodily substance for DNA testing (S.C. 1998, c. 37). In the U.S., the Senate and House passed legislation establishing rules and procedures governing applications for post-conviction DNA testing by inmates in the federal system who seek to show their innocence (The Innocence Protection Act of 2003, passed Nov 5, 2003).

[288] George Castelle, *Lab Fraud: Lessons Learned from the Fred Zain Affair*, 23 Champion 12 (1999).

[289] *Ibid.*

[290] *In the Matter of an Investigation of the West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E. 2d 501 at page 503.

> The acts of misconduct on the part of Zain included (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a suspect when testing supported only by a match with the victim; and (11) reporting scientifically impossible or improbable results.

The improprieties were found to be the result of systematic practice rather than an occasional inadvertent error.[291] One hundred and thirty four of Zain's court cases were implicated,[292] resulting in seemingly endless post-conviction *habeas corpus* proceedings that will extend well beyond Zain's death in 2002.[293]

The Fred Zain affair is not an isolated one. I have already discussed similar situations in England, Australia, New Zealand and Canada where, putting the matter most charitably, forensic scientists working in government or police-operated laboratories felt aligned with the prosecution, resulting in a perception that their mandate was to support the theory of the police.[294]

Fred Zain's approach to forensic science was brazen, disgraceful and, probably, unlawful.[295] "White lab coat fraud" has, however, arisen in a variety of other contexts, some much more subtle than Zain's but, regrettably, just as devastating

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[291] *Ibid.*

[292] *Ibid.* at page 511.

[293] He died on Dec. 2, 2002: see *Associated Press*, Dec. 3, 2002 at: www.gospelcom.net/apologeticsindex/rnb/archives/00001395.html

[294] *Supra.*, footnote 82 and accompanying text; also see Barry Scheck *et al*, *Actual Innocence* (New York: Penguin Books Ltd., 2001), *supra.*, footnote 158, at chapter 5.

[295] In 1994, Zain was indicted by a Grand Jury for perjury and fabricating evidence. Some of the charges were later dropped, and Zain successfully defended the rest on the basis of limitation periods. He was then charged with false pretenses on the basis of lying on the witness stand, and faking test results. In 2001, a jury was unable to reach a verdict on the charges. He was to have been retried in July 2002, but the trial was delayed indefinitely because he was diagnosed with cancer. He died in 2002 (N.I.J. Report, *supra.*, footnote 248, at page 18), and the *Associated Press* story, *supra.*, footnote 293.

as the power of DNA evidence continues to show just how wrong some forensic experts have been over the years.

In 1996, the U.S. Department of Justice published the booklet *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*.[296] It describes 28 cases in which convicted defendants were later shown to be innocent through DNA testing. The cases had been tried in 14 states. Many, however, shared a number of descriptive characteristics. Most had been decided in the 1980s. All 28 involved some form of sexual assault. The defendant had served an average of seven years in prison (longest 11 years; shortest nine months). Over half had been known to police prior to their arrest, usually through a criminal record. Significantly, all cases involved positive victim identification prior to and at trial;[297] and a majority of the cases involved non-DNA tested forensic evidence that was introduced at trial. Though not identifying the accused as the perpetrator, the forensic evidence significantly narrowed the field of suspects to include them. Typically, the evidence involved blood, semen or hair samples. Four of the cases involved the testimony of Fred Zain.[298]

Forensic evidence of this sort, labeled by some as "junk science," raises three important policy issues. First, as the Supreme Court of Canada has noted, expert evidence which advances a novel scientific theory or technique should be subjected to special scrutiny to determine whether it meets a basic threshold of reliability and necessity.[299] Second, even expert evidence that is otherwise logically relevant may still be excluded on the basis that its probative value is outweighed by its prejudicial effect. As the Supreme Court of Canada has noted:[300]

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[296] *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial* (1996), with a preface by then Attorney General Janet Reno. The authors were staff members of the Institute for Law and Justice in Virginia. The project was supported under grant from the National Institute of Justice, Office of Justice Programs, U.S. Department of Justice. For worldwide web access, connect to: www.ncjrs.org

[297] In one case (Kirk Bloodsworth), five eyewitnesses identified him. He was convicted, sentenced to death, and nine years later was pardoned on the basis of a DNA analysis (*ibid.*, pages 36-7).

[298] *Ibid.* at pages 12-21.

[299] *R v Melargni* (1992), 73 C.C.C. (3d) 348 (Ont. Ct), approved in *R v Mohan* (1994), 89 C.C.C. (3d) 402 (S.C.C.), at page 411- 412. The Supreme Court of the United States has adopted a somewhat similar approach: *Daubert v Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), discussed by Edward Imwinkelreid in "Flawed Expert Testimony: Striking the Right Balance in Admissibility Standards," 18 *Criminal Justice* 29 (2003).

[300] *Ibid.*; to the same effect, see: *D.P.P. v Jordan*, [1977] A.C. 699 at page 718.

> There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the jury as being virtually infallible and having more weight than it deserves.

Finally, there is a growing anxiety about hair and fiber comparisons in particular. Evidence of this nature was tendered and relied upon in eight of the 28 cases outlined in the United States Justice Department Report.[301] In 2001, Scheck, Neufeld and Dwyer concluded that microscopic hair comparison evidence had played a role in 35% of cases shown through DNA testing to have resulted in wrongful convictions.[302] Commissioner Kaufman in his report on the Morin case[303] observed that "there is a danger that hair and fiber evidence will be misused and will distort the fact-finding process," adding that its "probative value may often be insufficient to justify its reception".[304] He made this recommendation:[305]

> Trial judges should undertake a more critical analysis of the admissibility of hair comparison evidence as circumstantial evidence of guilt. Evidence that shows only that an accused cannot be excluded as the donor of an unknown hair (or only that an accused may or may not have been the donor) is unlikely to have sufficient probative value to justify its reception at a criminal trial as circumstantial evidence of guilt.

U.S. Courts have struggled with the admissibility of hair and fiber comparison evidence which yields nothing more than "it could have been the accused." In at least one decision, a court held that microscopic hair comparison evidence was unreliable and inadmissible.[306]

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[301] *Supra*, footnote 248 at pages 16-17.

[302] Scheck *et al*, *supra*, footnote 158, at page 361.

[303] *Supra*, footnote 99.

[304] *Ibid.* at page 320.

[305] *Ibid.* at page 311.

[306] *Williamson v Reynolds*, 904 F. Suppl. 1529 (E.D. Okla. 1995); as well, see the discussion of this point in the Morin Commission Report, *supra*, footnote 99, at page 321 *et seq*; Clive A. Stafford Smith and Patrick D. Goodman, *Forensic Hair Comparison Analysis: 19th Century Science of 20th Century Snake Oil* (1996), 27 *Columbia Human Rights Law Review* 227; Edward Imwinkelreid, *supra*; and see a rather interesting Peer Review Report in the case of *Montana v Bromgrad*, located at: www.innocenceproject.org/docs/bromgard_print_version1.html (Five independent forensic scientists challenged the testimony of a hair examiner with the Montana Laboratory of Criminalistics, and urged the

Recommendations

The risk that scientific evidence may mislead a court has several dimensions. Organizationally, a forensic laboratory may be too closely linked with law enforcement and the investigative function, causing scientists to feel aligned with the police. The very nature of the proposed evidence (or its manner of presentation) may be so imprecise and speculative that whatever probative value it may have is significantly outweighed by its prejudicial effect. During the trial, defence counsel need the tools to test the accuracy and the value of the evidence through an effective cross-examination. I will deal with each in turn.

i. Organizational Issues

Forensic labs should be independent from the police. Ideally, that means an independent, stand-alone organization with its own management structure and budget. If located within a policing or law enforcement organization, it should minimally be segregated into a specific branch or division, with a separate management structure and budget, physically located away from investigative units.

ii. Reliability Issues

a) Prosecution services should abandon any reliance on microscopic hair comparison evidence in court, moving, instead, to DNA testing in all cases.

b) Expert evidence which advances a *novel* scientific theory or technique should be subject to special scrutiny by prosecutors and the judiciary to determine whether it meets a basic threshold of reliability, and whether it is essential in the sense that the trier of fact will be unable to come to a satisfactory conclusion without the assistance of an expert.[307]

Montana Attorney General to establish an audit committee to review the situation.) Concurrently, the Government of Manitoba has on its own initiative initiated a forensic evidence review, focusing on microscopic hair comparison evidence: http://www.gov.mb.ca/justice/forensic/index.html . See a discussion of this, *infra.*, footnote 431 and accompanying text.

[307] *R v Mohan*, *supra.*, footnote 299 at page 415; and see *Daubert v Merrell Dow Pharmaceuticals*, *supra.*, footnote 299. Also, see Edward Imwinkelreid, *supra.*, footnote 299 at 34, who cautions that it may be a mistake to react in "knee-jerk" fashion to the revelations of flawed expert testimony. That may, he argues, increase the courts' dependence on lay witness testimony, potentially increasing rather than decreasing the frequency of wrongful convictions.

c) Forensic experts should avoid language that is potentially misleading. Phrases such as "consistent with" and "match", especially in the context of hair and fiber comparisons, are apt to mislead. Other examples include the assertion that an item "could have" originated from a certain person or object – when, in fact, it may or may not have.[308]

iii. *Effective Cross-Examination*

During pre-trial disclosure, the defence will usually receive forensic reports outlining the tests that were performed and describing, in conclusory terms, the results reached. These are often inadequate for independent review.

a) Defence counsel should be provided with the underlying raw data: the actual test results, notes, worksheets, photographs, spectrographs, and anything else that will facilitate a second, independent assessment.[309]

b) Defence counsel should be entitled to see the written correspondence and notes of telephone conversations between the investigators and the laboratory about the examination in question.

c) Defence counsel should receive a description of any potentially exculpatory conclusions that reasonably arise from any testing procedures undertaken by the laboratory relied upon by the prosecution.[310]

iv. Preservation of Exhibits and Notebooks

Increased anxiety over the possibility of wrongful convictions heightens the need to preserve key elements of a case for later review. At a minimum, in homicide cases, the prosecution and police file, exhibits tendered at trial, and evidence gathered but not used ought to be preserved for 20 years.[311] Recently, DNA

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[308] Morin Commission Report, *supra.*, footnote 99, Executive Summary at pages 47-8.

[309] Some of this may already be required in the United Kingdom, under the C.P.I.A., Code of Practice, section 25.1, *supra.*, footnote 179.

[310] Omission of this information can lead to a miscarriage of justice: *R v Ward*, [1993] 2 All E.R. 577 (C.A.).

[311] Sophonow Inquiry Report, *supra.*, footnote 124 at page 38.

examination of a 24-year-old bodily sample has, in one fell swoop, both exonerated a convicted person in prison for 23 years (David Milgaard), and established the culpability of another (Larry Fisher).[312]

e) Criminals as Witnesses

"The Crown cannot always rely on the local parish priest to prove its case," Justice Toy of the British Columbia Supreme Court said many years ago. "Sometimes the prosecution must rely on thieves, prostitutes and perjurers to prove the charges."[313]

That was not always the case. At common law, no person previously convicted of a felony could testify. The rule was based on two assumptions: such witnesses were incapable of telling the truth; and juries were incapable of recognizing a lie.[314] The rule was abrogated by statute in common law jurisdictions during the 19th Century,[315] and in its place a practice developed of warning the jury that the testimony of a witness with an unsavory or criminal background ought generally to be examined with great caution.[316]

Since then, at least in Canada, the courts have retreated from any notion that a fixed and invariable rule requires a warning to be provided; rather, it is a matter within the trial judge's discretion, based on an assessment of all of the factors in evidence that might impair the worth of a particular witness.[317]

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[312] *Reference re Milgaard (Canada)* (1992), 71 C.C.C. (3d) 260 (S.C.C.); further considered in *R v Fisher* (1999), 139 C.C.C. (3d) 418 (Sask. Q.B.) Defendant Fisher was later convicted of precisely the same murder for which Milgaard, 30 years earlier, had been found responsible and had spent 23 years in jail: *A Canadian Tragedy*, by Anne Bayin, www.cbc.ca/news/indepth/canadian_tragedy. Fisher's appeal against conviction was later rejected by the Saskatchewan Court of Appeal, and the Supreme Court of Canada refused leave to further appeal the case: *R v Fisher* (2003), 179 C.C.C. (3d) 138, lv. ref. 186 C.C.C. (3d) vi (S.C.C.).

[313] *U.S.A. v Meier* (unrep, March 1, 1982, B.C.S.C.).

[314] *R v Brooks* (2000), 141 C.C.C. (3d) 321 (S.C.C.), per Major, J. at pages 342-3.

[315] *Ibid.*

[316] *Ibid.* at page 343; *R v Baskerville*, [1916] 2 K.B. 658.

[317] *R v Brooks, supra.*; *R v Bevan* (1993), 82 C.C.C. (3d) 310 (S.C.C.); *R v Vetrovec* (1982), 67 C.C.C. (2d) 1 S.C.C. A similar approach exists in Australia: *Bromley v The Queen* (1986) 161 C.L.R 315; *Pollitt v The Queen* (1992), 174 CLR 558 (H.C.). For a model charge to the jury in the United States on the issue of an accomplice's evidence, see: The Honorable Stephen S. Trott, *infra*., footnote 318, at pages 1421-3.

Prosecutors are, therefore, able to rely upon a wide range of witnesses with criminal backgrounds: accomplices; unindicted co-conspirators; police informants; and so-called "jailhouse informants." While the law may have relaxed the rules surrounding the reception of the testimony of these witnesses, it is increasingly clear that the dangers associated with their evidence remain intact.

In 1996, Stephen S. Trott, Circuit Judge in the United States Court of Appeals for the Ninth Circuit (and a former federal prosecutor) wrote an excellent article on the dangers associated with calling criminals as witnesses.[318] He gave two warnings to prosecutors, especially those unfamiliar with the treachery of such witnesses. He urged that these two messages be read and committed to memory:[319]

> (a) Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law.
>
> (b) Ordinary decent people are predisposed to dislike, distrust and frequently despise criminals who "sell out" and become prosecution witnesses. Jurors suspect their motive from the moment they hear about them in a case, and they frequently disregard their testimony altogether as highly untrustworthy and unreliable...[320]

The most dangerous witness of all is the jailhouse informant.[321] This inmate witness claims that another prisoner confessed to him. By definition, jailhouse informants were in prison at the time of the alleged confession. Most are charged with, or have been convicted of, a serious crime. They are, therefore, highly motivated to curry favour with those authorities perceived by them to have control over their destiny.

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[318] The Honourable Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, (1996), 47 Hastings L.J. 1381.

[319] *Ibid.* at pages 1383 and 1385.

[320] Surprisingly, this view is not universally held. Peter Neufeld testified in the Sophonow Inquiry that "to the average juror, there is not much difference between the manner in which they receive and weigh a confession given to a police officer and a confession given to a jailhouse informant": *Sophonow Inquiry Report, supra.*, footnote 124 at page 71.

[321] *Jailhouse Informants. Part I: Problems with their Use*, by Christopher Sherrin, (1997) 40 Cr. L. Q. 106; *Part II: Options for Reform*, 40 Cr. L. Q. 157; Jeremy Dein, *Non Tape Recorded Cell Confession Evidence – On Trial*, [2002] *Crim. L.R.* 630; and see the comments of Commissioner Cory in the Sophonow Inquiry Report, *supra.*, footnote 124 at page 63; Robert M. Bloom, "Jailhouse Informants," 18 *Criminal Justice* 20 (2003).

Among law enforcement officials, the lure of informants is strong because they save both time and effort, and can provide the "big picture" to the court. Additionally, a jailhouse informant brings all these factors together, and adds a confession – the most powerful piece of evidence that a prosecutor can use in securing a criminal conviction.

The most comprehensive examination of the role of jailhouse informants in the criminal justice system was conducted by the Los Angeles County Grand Jury in 1989.[322] That review was undertaken in the wake of a revelation by Leslie White, a repeat jailhouse informant, that he was able to obtain information about a fellow inmate's case by impersonating public officials over the telephone from inside the jail. The information was used to construct the fellow inmate's "confession," which he then offered to the prosecutor in return for a variety of benefits.

One hundred and twenty seven witnesses testified before the Grand Jury. One hundred and forty seven exhibits were filed. Hundreds of additional interviews were conducted by Grand Jury investigators and staff, including prison officials, probation officers, defence counsel, district attorneys, Los Angeles Police Department officers and some jailhouse informants.

The Grand Jury subsequently published a 153-page report.[323] Several findings are critical. First, the range of benefits and favoured treatment which are potentially available are compelling incentives to offer testimony and fabricate evidence.[324] The Grand Jury added: "the courts have sometimes lacked adequate factual information to fully realize the potential for untrustworthiness."[325]

The inmate invariably wants *something*. The more sophisticated informants may attribute their willingness to testify to other, laudable motives such as: their repugnance toward the particular crime charged; a family member having been a victim of a similar crime; or a lack of remorse by the defendant in the face of clear guilt.[326]

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[322] *Report of the 1989-90 Los Angeles County Grand Jury: Investigation of the Involvement of Jailhouse Informants in the Criminal Justice System in Los Angeles County* (Douglas Dalton, esq., Special Counsel: 1989).

[323] *Ibid.*

[324] *Ibid.* at pages 10-11.

[325] *Ibid.* at page 11.

[326] *Ibid.* at page 12.

The range of benefits sought are innumerable, with some being quite subtle: release from custody; television and other amenities in the cell; and others, not quite so subtle: witness protection to a third party, such as a girlfriend; reduction in sentence; early release; immunity from prison discipline; a promise of free accommodation after release.[327]

In its report, the Grand Jury laid the blame for the crisis in public confidence at the feet of two agencies: the District Attorney's Office, for deliberately failing to curtail an ever-spiraling misuse of jailhouse informants; and the Sheriff's Department (a police agency) for placing inmates in such a way that false confessions could easily be claimed.[328]

Within a few years, American courts sent a warning to U.S. prosecutors that government is in a unique position to curtail the use of criminals as witnesses:[329]

> A prosecutor who does not appreciate the perils of using rewarded criminals as witnesses risks compromising the truth-seeking mission of our criminal justice system...Because the government decides whether and when to use such witnesses, and what, if anything, to give them for their service, the government stands uniquely positioned to guard against perfidy. By its action the government can either contribute to or eliminate the problem. Accordingly, we expect prosecutors and investigators to take all reasonable measures to safeguard the system against treachery.

Reliance on jailhouse informants has, however, continued in the United States, attracting criticism in the media,[330] and recommendations in the 2002 report to Illinois Governor George Ryan that would restrict the use of such evidence.[331]

Word also spread overseas. Australian Commissioner Ian Temby, Q.C. in his *Report on Investigation into the Use of Informers (Volume 1)*[332] observed that he

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[327] *Ibid.* at pages 12-15.

[328] *Ibid.* at page 6.

[329] *U.S. v Bernal – Obeso*, 989 F.2d 331 at 333-4 (Ninth Circ. 1993)

[330] Steve Mills and Ken Armstrong, "The Jailhouse Informant", the *Chicago Tribune* online edition, published November 16, 1999; Glenn Puit, "Murder Trial: Jailhouse Informant Testifies," *Las Vegas Review – Journal*, published Friday, June 7, 2002.

[331] *Supra.* footnote 166, at page 121 (Disclosure of the Witness' Background); page 131 (Jury Caution); page 158 (Corroboration in Death Penalty Cases). See also Robert M. Bloom, *supra.*, footnote 321.

[332] Quoted in the Morin Inquiry Report, *supra.* footnote 99 at page 559.

had visited California in 1991, and found it "dispiriting" that the problem was being ignored in most parts of the United States. He added: "that is simply unrealistic. What happened in Los Angeles could happen in other parts of the United States, and could happen in Australia."[333] In fact, the following year the High Court of Australia considered the evidence of a "prison informer", noting that, absent unusual circumstances, such evidence is by its nature unreliable and capable of leading to a miscarriage of justice.[334] As I outlined earlier, the problem had already taken root in Canada, significantly contributing to two wrongful convictions,[335] and has since been implicated in others.

Building on the premise developed by Clifford S. Zimmerman in a recent article on informants and wrongful convictions,[336] namely, "to ensure that the road from the jailhouse to the courthouse is not littered with the remains of innocent victims," [337] it is critical that those in a position of authority take steps to scrutinize the evidence carefully, and restrict its use to those cases for which there is a clear basis to believe that the evidence can safely be relied upon.

Recommendations

Jailhouse informants are the most dangerous of all witnesses. Prosecution services should:

i. Establish a screening committee of senior prosecutors to assess whether a jailhouse informant should be called at trial. Helpful assessment criteria were recommended by Justice Kaufman in the *Morin Commission Report* (1998).[338] They were subsequently adopted by Justice Cory in the *Sophonow Commission Report* (2001),[339] and were again referred to with

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[333] Page 37 of his Report, quoted in the Morin Report, *supra.* footnote 99 at page 559.

[334] *Pollitt v The Queen* (1992), 174 CLR 558 (H.C.); most recently considered in *R v Joyce* [2000] NSWCCA 259.

[335] The Morin and Sophonow Public Inquiries, discussed *supra.*

[336] Clifford S. Zimmerman, *From the Jailhouse to the Courthouse: The Role of Informants in Wrongful Convictions*, an essay in *Wrongfully Convicted* (New Brunswick: Rutgers University Press, 2001), at pages 55 – 76.

[337] *Ibid.* at page 73.

[338] Morin Commission Report, *supra.*, footnote 99, Executive Summary, page 57.

[339] Sophonow Inquiry Report, *supra.*, footnote 124 at page 63.

approval by the Commission on Capital Punishment presented to Illinois Governor George Ryan in 2002.[340]

ii. Establish a publicly accessible registry of all decisions taken by the jailhouse informant screening committee.[341]

iii. Enter into a written agreement with the witness, in which all of the undertakings, terms and conditions of the testimony are agreed upon. It should then be provided to the defence as part of the pre-trial disclosure, and tendered in evidence when the witness testifies.[342]

iv. Ensure the police videotape all interviews with the witness.

v. Assign a prosecutor to conduct the trial who was not previously involved in the discussions or negotiations with the jailhouse informant, to ensure that "fresh eyes" are brought to the assessment of the case.

vi. *Not* call more than one jailhouse informant in any given case, because of the cumulative effect of multiple witnesses.[343]

vii. *Not* proceed to trial where the testimony of the jailhouse informant is the only evidence linking the accused to the offence.

viii. *Not* tender the evidence of a jailhouse informant who has a previous conviction for perjury, or any other crime for dishonesty under oath, unless the admission sought to be tendered was audio or video recorded, or the statements attributed to the accused are corroborated in a material way.[344]

ix. Provide ongoing legal education to prosecutors and police who may encounter jailhouse informers.

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[340] *Supra.*, footnote 166 at pages 122-3.

[341] For example, see the Sophonow Inquiry Report, *supra.*, footnote 124 at page 197, commented upon by Justice Cory at pages 72 and 74.

[342] As suggested by the Judicial Committee of the Privy Council in *R v McDonald*, [1983] N.Z.L.R. 252 (P.C.).

[343] Sophonow Commission Report, *supra.*, footnote 124 at page 73.

[344] For a discussion of this in the U.K., see: Jeremy Dein, *Non Tape Recorded Cell Confession Evidence – On Trial*, [2002] *Crim. L.R.* 630.

x. Link together in the establishment of a *national* jailhouse informant registry that would allow police, prosecutors and defence counsel to have access to the prior testimony of such witnesses, and any patterns that may exist respecting their attempted or actual testimonial involvement in criminal cases.

f) Inadequate Defence Work

Our adversarial process operates on the premise that the truth of a criminal allegation is best determined through "partisan advocacy on both sides of the case."[345] An accused who chooses to be defended by counsel at his or her trial is entitled to expect the effective assistance of counsel.[346] That right, as a constitutional element of the right to make full answer and defence and the right to a fair trial, had its origins in the common law,[347] and in both Canada and the United States the right is constitutionally protected.[348]

This legal framework assumes that each side has adequate counsel of roughly equal abilities. Where defence counsel fails to provide effective representation, the fairness of the trial may suffer, and in some cases a miscarriage of justice will occur.[349]

An overwhelming number of criminal defendants are indigent. This indigency means that they are represented by private counsel who are paid minimal fees through legal aid schemes, or by staff lawyers in legal aid or public defender

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[345] *R v B. (G.D.)* (2000), 143 C.C.C. (3d) 289 (S.C.C.), at par. 25; *U.S. v Cronic*, 104 S. Ct. 2039 (1984), at page 2045. Generally, see: Daniel Givelber, "The Adversary System and Historical Accuracy," *Wrongly Convicted, supra.*, footnote 176, at page 253 *et seq.*

[346] *R v B. (G.D.), supra.*; *Strickland v Washington*, 466 U.S. 668 (1984); *Mills v The Queen*, [1995] 1 W.L.R. 524 (P.C.); *R v McLoughlin*, [1985] 1 N.Z.C.R. 106 (C.A.); *Anderson v H.M. Advocate*, [1996] S.L.T. 155 at page 160; *R v Birks*, [1990] 19 N.S.W.L.R. 677; *Dietrich v The Queen* (1992), 177 C.L.R. 292 (H.C.), per Deane, Toohey and Jaudron, JJ. It is important to note, however, that in assessing the effectiveness issue Canada and the United States focuses on the conduct of counsel, and the degree of incompetence; courts in England, Scotland, Australia and New Zealand examine the issue in terms of the impact of that conduct on the *fairness of the trial*: see the discussion of this issue in: *R v Delisle* (1999), 133 C.C.C. (3d) 541 (Que. C.A.).

[347] *R v B. (G.D.) supra.*; *R v Delisle*, *supra.* at pages 546-7.

[348] *Strickland v Washington*, *supra.*; *R v B. (G.D.)*, *supra.*; for the situation in the Commonwealth, see *ibid.*

[349] *R v B. (G.D.)*, *supra.*, at page 297-8; David L. Bazelon, *The Defective Assistance of Counsel*, 42 U.Cin.L. Rev. 1 (1972), at page 2 [Judge Bazelon was appointed to the U.S. Court of Appeals for the District of Columbia Circuit in 1949, and from 1962-1978 served as Chief Justice, retiring in 1986: www.bazelon.org] and for a general discussion of this issue, see Lissa Griffin 16 A.M.U. Int'l L. Rev. 1241 (2001), at page 1259 et seq.

offices.[350] The vast majority of these counsel represent their client competently, and with an appropriate degree of skill.[351] There are, however, some realities that have led to miscarriages of justice, and some of them are nothing less than horror stories.

The recent exoneration of Jimmy Ray Bromgard in Montana provides a disturbing illustration of the effects of inadequate or incompetent counsel. Arrested when he was 18 years of age, Bromgard spent 15 years in prison for the brutal rape of an eight-year-old girl which post-conviction DNA tests show he did not commit.[352] His trial counsel conducted no investigation, filed no pre-trial motions, gave no opening statement, was unprepared for closing argument, failed to file an appeal, and provided no expert to refute the dubious forensic evidence tendered by the prosecution. The case was anchored on this forensic evidence, as well as a tentative identification by the victim.[353]

In the wake of Bromgard's exoneration, five independent forensic scientists have publicly challenged the forensic evidence led by the prosecution at his trial, calling on the Attorney General of Montana to establish an audit committee to review the situation.[354] In addition, the American Civil Liberties Union filed a class action lawsuit against the indigent defence system in Montana. The action focuses on the need to enforce standards and improve resources for counsel representing the indigent.[355]

Some anecdotal information on other cases is equally disconcerting: the lawyer who told the judge he would sum-up quite quickly to avoid getting a parking ticket;[356] the lawyer who spent only 15 minutes with his client before pleading him guilty to a death penalty charge despite the defendant's claim of exculpatory witnesses;[357] the lawyer who slept through most of the trial;[358] and the lawyer

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[350] Lissa Griffin, *ibid.*, footnotes 12 and 64, quoting in part Judge David L. Bazelon.

[351] See the discussion of this issue, generally, in: *R v Cai* (2002), 170 C.C.C. (3d), (Alta. C.A.).

[352] Innocence Project www.innocenceproject.org/causes/badlawyering.php

[353] *Ibid.*

[354] *Ibid.*

[355] *Ibid.* [follow the links for the pleadings that have been filed].

[356] Lissa Griffin, *supra.*, at pages 2-3.

[357] *Ibid.* at page 11.

[358] *Ibid.* at page 30; Barry Scheck et al, *Actual Innocence*, *supra.*, footnote 158 at page 244.

assigned by the court to a death penalty case who was drunk in court, missed the testimony of important witnesses because he failed to appear, and gave his business address as Kelly's Keg, a local bar.[359] Despite all of this, a court in Kentucky concluded that his behaviour had not adversely affected his client.[360]

In the 1978 case of Dennis Williams, charged with murder, counsel for the accused (Archie Weston) turned in an uninspiring performance: among other things, he allowed jurors to be excluded on the basis of race, and failed to verify dubious forensic evidence relied upon by the prosecution. His client was found guilty, and was sentenced to die. In a subsequent review, it was learned that at the time of the trial his counsel was in the process of a "personal collapse:" in unrelated civil proceedings, he had been held in contempt; he was on the verge of bankruptcy; his house had been seized; and he was facing disbarment proceedings.[361] On appeal, Williams was granted a new trial, and Weston was disbarred.[362]

Many cases, however, are not as obvious as these. Commonly, they involve judgment calls or decisions concerning trial strategy that is later second-guessed.[363]

In a recent Canadian case, flagrant incompetence requiring a new trial was found on the basis that the defence counsel elected not to call the accused as a witness because he did not believe him, despite his client's desire to testify.[364]

The clash of two relatively equal opponents usually generates a reliable result. Indeed, in the *Report of the Governor's Commission on Capital Punishment,* the Commissioners noted that "providing qualified counsel is perhaps the most important safeguard against the wrongful conviction, sentencing and execution of

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[359] Scheck et al, *ibid.* at page 244.

[360] *Ibid.*

[361] Barry Scheck et al, *ibid.*, at page 239-40; *Illinois v Dennis Williams*, 93 Ill. 2d 309 (1982); *In re: Archie Benjamin Weston*, 92 Ill. 2d 431 (1982).

[362] Scheck et al, *ibid.*; and see Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongfully Convicted*, 36 Ga. L. Rev. 665 (2002).

[363] For a discussion of the recent trend of defendants "turn(ing) on their own lawyers" in the United Kingdom, see: *Blaming the Lawyer*, by Robert S. Shiels, [1997] Crim. L. R. 740.

[364] *R v Delisle* (1999), 133 C.C.C. (3d) 541 (Que. C.A.)

capital defendants."[365] However, shrinking public resources for the defence of criminal cases, coupled with a public dislike of spending large amounts of public funds on criminal defendants sometimes creates an uneven playing field that ultimately serves as fertile ground for a wrongful conviction.

g) False Confessions

Despite popular belief, innocent individuals sometimes confess to a crime they have not committed. In a recent U.S. study, 22% of persons ultimately exonerated through DNA testing had originally "confessed" to the crime.[366] In the United Kingdom, analysts have found that false confessions were the most common cause of wrongful imprisonment, after eyewitness misidentification.[367]

In 2000, the Supreme Court of Canada noted that researchers have concluded that there are five basic kinds of false confessions:[368] voluntary, stress-compliant, coerced-compliant, non-coerced-persuaded and coerced-persuaded. The latter four are of particular interest.

First, stress-compliant confessions occur when the aversive interpersonal pressures of interrogation becomes so intolerable that suspects comply in order to terminate questioning. The suspect literally "gives in", to escape the punishing experience of interrogation.

Second, there are coerced – compliant confessions which are the product of classic coercive influence techniques such as threats and promises.

A third kind of false confession is the non-coerced-persuaded confession. In this scenario, police tactics cause the innocent person to "become confused, doubt his memory, be temporarily persuaded of his guilt and confess to a crime he did not

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[365] Ryan Commission, *supra.*, footnote 166, at page 105. The Commission also found that 21% of reversals in the 250 death penalty cases it studied were the result of "deficiencies in the conduct of defence counsel:" page 191.

[366] *Scheck et al, supra.*, at page 120 and 361. Generally, see the discussion of this issue in *R v Oickle* (2000) 147 C.C.C. (3d) 321 (S.C.C.), at par. 34 *et seq.*

[367] *Wrongful Imprisonment*, by Ruth Brandon and Christie Davies (London: George Allan Unwin Ltd., 1973), at page 47; Richard A. Leo, "False Confessions: Causes, Consequences, and Solutions", *Wrongly Convicted, supra.*, at footnote 176 (page 44). [Richard Leo is an Assistant professor of criminology, law & society and an Assistant professor of psychology & social behaviour the University of California at Irvine. He is one of the leading experts in the world on American police interrogation practices, coercive influence techniques, false confessions, and miscarriages of justice.] And see: Meissner and Russano, *supra.*, footnote 221 at 53.

[368] *R v Oickle*, supra, at par. 37 *et seq.*

commit".[369] The Supreme Court added that the use of *fabricated* evidence can also help convincing an innocent suspect of his or her own guilt.

The final type of false confession is the coerced-persuaded confession. This is like the non-coerced persuaded, except that the interrogation also involves the classically coercive aspects of the coerced-compliant confession.

Throughout the 19th Century and well into the 20th Century, police in the United States (if not more broadly) regularly relied on physical coercion to extract confessions from suspects.[370] Third-degree interrogations continued unabated until the 1930s, when a number of factors led to their decline. Borchard's book, *Convicting the Innocent* (1932), exposed wrongful convictions based on confessions extracted through threats, torture and beatings using rubber hoses, phone books and fists.[371] In 1936, the Supreme Court of the United States considered a case in which a Deputy Sheriff readily admitted to tying three black suspects to a tree and whipping them until they confessed. Reversing the verdict of guilty entered at trial, Chief Justice Hughes observed that "it would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these (accused)."[372]

During the past 60 years, more subtle and sophisticated interrogation methods have replaced third-degree tactics.[373] Led by a new wave of interrogation theorists, most notably Inbau and Reid,[374] police started to approach suspects in new ways, often in three stages: first, breaking the resistance of otherwise rational people by causing the suspect to perceive their situation as hopeless: "the facts are indisputable, and there is no way out of this predicament." Second, manipulate them to stop denying their culpability; third, persuade them to confess, often on

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[369] *Ibid* at par. 40.

[370] Leo, *ibid*., at page 37; Scheck *et al*, *supra* footnote 158, at pages 114-15; *R v Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.), par. 34.

[371] Edwin M. Borchard, *supra*., footnote 2.

[372] *Brown v State of Mississippi*, 297 U.S. 278 at 286.

[373] Leo, *supra*., at page 37; Scheck *et al*, *supra*., at page 116; Steven Wisotsky, *Miscarriages of Justice: their Causes and Cures*, 9 St. Thomas L. Rev. 547 (1997) at page 554.

[374] *Criminal Interrogation and Confessions* by Fred E. Inbau & John E. Reid (Baltimore: The Williams and Wilkins Co., 1967); previously, see: *Lie Detection and Criminal Interrogation* by Fred E. Inbau and John E. Reid (Baltimore: Williams and Wilkins, 1953), third edition. Richard A. Leo, *supra*., footnote 367 at page 38 et seq; Meissner and Russano, *supra*., footnote 221 at 54-61. See also the discussion of this issue by the Supreme Court of Canada in *R v Oickle*, *supra*., footnote 366.

the basis of inducements or by convincing the suspect that there are very few options left.[375]

False confessions easily lead to miscarriages of justice because of the significant impact they have on the decision-making process of justice officials and lay juries.[376] Except in the rare situation where a perpetrator is actually caught in the act of committing the crime, a confession is regarded as the most powerful, persuasive and damning evidence of guilt that the state can adduce.[377] It follows, therefore, that a *false* confession is the most prejudicial evidence that can arise at trial. Judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime.[378]

Perhaps the classic example of a police-induced false confession is the British case of Timothy Evans, 25, a van driver of low intelligence, who was convicted and *executed* in 1950 for allegedly strangling his wife and 14-month-old daughter.[379]

In 1949, Evans' wife became pregnant. They had one child, and could not afford another one. They agreed with their landlord, John Christie, that he perform an illegal abortion. Evans went to his hometown in Wales, and on his return was told by Christie that the abortion had gone wrong and his wife had died. Evans was extremely distraught, and returned to Wales.

Evans then went to a police station in Wales and made this rather peculiar statement to police: "I have disposed of my wife. I put her down the drain." He wove an incredible story about a stranger assisting in an abortion, his wife taking too much medicine designed to induce the abortion, and placing his wife's body headfirst down the drain outside his front door. Police investigated, and his story started to unravel. He then changed his story – this time implicating himself and Christie.

Police took two more confessions from Evans. He said he was responsible, and that it was a relief to get it off his chest. Some of the words allegedly used by

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[375] Leo, *supra.*, at pages 38-9.

[376] *Ibid.* at page 45; see also *R v Oickle*, *supra.*, par. 34.

[377] *Ibid.* at page 45; *Arizona v Fulminante*, 499 U.S. 279 (1991), at 280.

[378] *Ibid.* at page 46.

[379] *10 Rillington Place*, by Ludovic Kennedy (London: The Quality Book Club, 1961).

Evans, however, seemed beyond his intellectual capacity. He continued to confess, but could not offer an explanation as to why he had killed the baby.

Ludovic Kennedy, whose book on the case set off a firestorm of controversy,[380] suggested that the police may have edited the statements and "guided" Evans' confession.[381] What we do know is this: Christie testified for the prosecution at Evans' trial for capital murder. Evans was found guilty, and was executed on March 9, 1950. Christie then became distraught, apparently over a sense of guilt after Evans' execution. He was found wondering the streets of London, and a search of his house revealed the bodies of several women, including his own wife. In 1953, he was charged, tried and executed for the same crimes for which Evans had been executed three years earlier.[382]

Following two public inquiries into the case, Evans received a posthumous free pardon from the British Government in 1966.[383] The case has since become one of the most notorious miscarriages of justice in British legal history.

Fast forward to 2001: the Canadian case of Thomas Sophonow, which I have already discussed.[384] In the public inquiry that followed Sophonow's exoneration, Commissioner Cory found that the police interrogation had been so intense that Sophonow came to believe that he had actually committed the murder.[385]

In 2003, the Alabama Court of Appeals concluded that a manifest injustice had occurred when three youths with limited intelligence confessed and were convicted of the killing of an unborn child that had never existed. One of the three

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[380] *Ibid.*; a movie was also released under the same name: *supra.*, footnote 4.

[381] *Ibid.*; in 1992, A.A.S. Zuckerman discussed the manner in which an interrogator can, consciously or otherwise, "lead" the witness's own memory of events: *Miscarriage of Justice – A Root Treatment*, by A.A.S. Zucherman, [1992] Crim. L. R. 323 at page 336-7.

[382] Ludovic Kennedy, *supra.*; also see "Timothy Evans and John Reginald Halliday Christie", at http://www.royd.moore.btinternet.co.uk/volletters2.html; www.innocent.org.uk/cases/timothyevans; *The Trial of Timothy Evans*: www.crimelibrary.com/serial_killers/history/christie/evans_5.html?sect=6; Evans' Confession: www.crimelibrary.com/serial_killers/history/christie/confess_4.html?sect=6

[383] *Ibid.*

[384] *Supra.*, footnote 124 and accompanying text.

[385] Sophonow Inquiry Report, *supra.*, footnote 124, at page 91. Cory said of Sophonow's description of this interview: "There can be no doubt of the devastating and traumatic effect that the first interview…had upon Thomas Sophonow. No actor, however skillful and experienced, could have portrayed Thomas Sophonow's tortured reaction to his recollection of it. He was clearly deeply disturbed by it. I have no doubt that he was completely traumatized by that interview and that the memory of it has haunted him from that day to this" (page 91).

had feigned pregnancy, but medical tests later showed that she had not been pregnant, and was incapable of becoming pregnant.[386]

Thus far, I have concentrated on *police-induced* false confessions, arising from a systemic breakdown of the normal procedural and substantive safeguards found within the criminal justice system. Some false confessions, however, have more to do with the *suspect* under investigation than with the police.

Some confessions are given to the police with a view to achieving a personal objective. For example, Bedau and Radelet record a case where the suspect falsely confessed – twice – to impress his girlfriend.[387] In others, it appears that the suspect made an admission for some real or perceived advantage, such as protecting someone else, the saving of time, trouble or money, or because they thought it would mean less publicity in the media.[388] Then there are those who seek their 15 minutes of fame, and revel in the spotlight of publicity.[389]

In other situations, the suspect seeks to *avoid* a penalty which, at the time, seems to be much more onerous than the maximum sentence for the crime under investigation by police. For instance, there was the woman who claimed to have assisted in the killing of a man, rather than admitting that at the time of the murder she had been in bed having sex with a married man.[390]

Du Cann also contends that there are some "ultra sensitive" people who "when accused, panic exceedingly, worry desperately and in a longing to escape what is to them an ordeal ('to get it over and done with,' as they say) wrongly plead guilty to some offence...though they never committed it at all."[391] Finally, there is some evidence that defendants in the United States have falsely confessed to crimes to avoid exposure to the death penalty.[392]

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[386] *The Tragedy of the Choctaw Three*, www.justicedenied.org/choctawthree.htm

[387] Bedau and Radelet, *supra.*, footnote 2 at page 63.

[388] C.G.L. Du Cann, *supra.*, footnote 28 at page 230. Meissner and Russano suggest "that the desire to protect someone else is likely to be the most common motivation behind a false confession:" *supra.*, footnote 221 at 54.

[389] *Ibid.* at page 229.

[390] Edward D. Radin, *The Innocents* (New York: William Moreau, and Co. 1964), at pages 146-8; also see Bedau and Radelet, *supra.*, footnote 2 at page 63.

[391] C.G.L. Du Cann, *supra.*, footnote 28 at pages 229-30.

[392] Bedau and Radelet, *supra.*, footnote 2 at page 63.

There is no doubt that false confessions have contributed to wrongful convictions in a significant way. The reasons behind falsely implicating oneself are elusive, often lying in the mind of the suspect or in the dynamic that develops between suspect and interrogator. Sometimes the interview provides a vehicle for a suspect to achieve a personal objective or protect someone else. More commonly, however, the interrogator *leads* the suspect to a product that will be helpful in court. One thing is clear, however: once given, a false confession is dynamite in the hands of a prosecutor. Rarely can it be shown that it is unsafe to rely upon it. So it sits there, forever haunting the author who eventually will see that his own words will now colour every decision point that has yet to unfold in his (or her) case.[393]

Recommendations

I advance two policy recommendations with a view to reducing the prospect of police-induced confessions, and maximizing the likelihood that statements will be, and be seen as, voluntary, fairly taken, and admissible in evidence.

First, custodial interviews of a suspect at a police facility in a serious case such as homicide should be videotaped. Videotaping should not be confined to the final statement made by the suspect, but should include the entire interview process.

There are several reasons for this. First, there are significant benefits to law enforcement agencies. The recording provides the very best evidence of what occurred – allowing police to establish the fairness of their interview tactics. A 1993 study by the National Institute of Justice in the United Stated revealed that once officers adjusted to the idea of being videotaped, they found the process useful. Allegations of police misconduct dropped, and guilty pleas increased.[394] These conclusions were reaffirmed a decade later by Thomas P. Sullivan, Co-Chair of the Ryan Commission on Capital Punishment in Illinois and Chair of the Advisory Board of the Centre on Wrongful Convictions at the Northwestern

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[393] Richard A. Leo, *supra*., footnote 367 at page 45 *et seq*. The most recent example of a false confession is the infamous *Central Park Jogger Case*, in which 5 young men were convicted of a brutal crime and had served their sentences before DNA testing pointed to the actual perpetrator. Their claims of coercive interrogation tactics were overwhelmed by their videotaped "confessions"; see: www.innocenceproject.org/causes/falseconfessions.php; and see the editorial comment in the New York Times on January 10, 2003: http://query.nytimes.com/gst/abstract.html?res=F0061EFA355A0C738DDDA80894DB404482

[394] Gellar, *Videotaping Interrogations and Confessions*, National Institute of Justice, March 1993; also, see Meissner & Russano, *supra*., footnote 221 at 61.

University School of Law, in his 2004 study of 238 law enforcement agencies in 38 states in the United States.[395]

Videotaping also guards against the admission into evidence of false confessions. The following rationale described by Professor Welsh S. White in 1997 was quoted with approval by the Supreme Court of Canada three years later:[396]

> Videotaping police interrogation of suspects protects against the admission of false confessions for at least four reasons. First, it provides the means by which courts can monitor interrogation practices and thereby enforce the other safeguards. Second, it deters the police from employing interrogation methods likely to lead to untrustworthy confessions. Third, it enables courts to make more informed judgments about whether interrogation practices were likely to lead to an untrustworthy confession. Finally, mandating this safeguard device accords with sound public policy because the safeguard will have additional salutary effects besides reducing untrustworthy confessions, including more net benefits for law enforcement.

Thomas P. Sullivan argues powerfully that there are yet two further reasons to videotape: recordings allow the investigators to focus on the suspect and what he is saying, rather than being pre-occupied with taking copious notes. Indeed, his study concluded that while note-taking may cause a suspect to "clam up", a recording facilitates a normal back-and-forth between interrogator and suspect.[397] A recording of the interview also increases public confidence, Sullivan contends, as it publicly provides a precise record of what the police did, and how the suspect responded.[398]

Some jurisdictions have already developed an electronic recording requirement. In 2003, Illinois became the first U.S. State to legislatively require electronic

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[395] Thomas P. Sullivan, "Police Experiences with Recording Custodial Interrogations," a Special Report presented by Northwestern University School of Law Centre on Wrongful Convictions (No. 1, Summer 2004), http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf

[396] Professor Welsh S. White, *False Confessions and the Constitution, Safeguards Against Untrustworthy Professions*, *Harvard Civil Rights – Civil Liberties Law Review*, volume 32, page 105 (1997), at pages 153-54. This passage was quoted with approval by the Ryan Commission on Capital Punishment in Illinois, *supra.*, footnote 166 at page 25, and by the Supreme Court of Canada in *R v Oickle* (2000), 147 C.C.C. (3d) 321 (S.C.C.), at par. 34 *et seq*, esp. par. 46.

[397] Thomas P. Sullivan, *supra.*, page 10-11, and 20.

[398] *Ibid.* at page 16.

recording at police or detention facilities in homicide investigations.[399] State Supreme Courts in two States (Alaska and Minnesota) have for many years required law enforcement agencies to record custodial questioning.[400] In the United Kingdom the Secretary of State has been authorized to issue a code of practice with respect to recording, and to *require* it in certain defined circumstances.[401]

The second recommendation concerns police training. Investigators need to receive better training about the existence, causes and psychology of police-induced false confessions. There needs to be a much better understanding of how psychological strategies can cause both guilty *and innocent* people to confess. In addition, police need to receive better training about the indicia of reliable and unreliable statements, including narratives that are simply false. Testing the statements against other established case facts will also guard against tunnel vision, and potentially enhance the strength of the case for ultimate presentation to the courts.

h) Misleading Circumstantial Evidence

In certain types of cases, circumstantial evidence is capable of pointing inexorably to the guilt of the accused.[402] On occasion, however, it is misleading, unreliable, and can prompt a miscarriage of justice.[403] In a celebrated and oft-quoted charge to the jury in *Commonwealth v Webster,*[404] Chief Justice Shaw said this:

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[399] Code of Criminal Procedure of 1963, 725 ICLS 5, s. 103.2.1.

[400] *Stephan v State*, 711 P. 2d 1156 (Alaska 1985); *State v Scales*, 518 N.W. 2d 587, 592 (Minn. 1994).

[401] *Police and Criminal Evidence Act* (1984), c. 60.

[402] *Reference re R v Truscott*, [1967] 2 C.C.C. 285 (S.C.C.), at page 360-1, per Hall, J. dissenting, but not on this point; *Côté v The King* (1941), 77 C.C.C. 75 (S.C.C .), at page 76; *The Queen v Florance*, [2001] N.Z.C.A 127; *Festa v The Queen*, [2001] H.C.A. 72; this point was made as early as Borchard, *supra.*, footnote 2 at page 368.

[403] "Aware of this danger, Colorado, when it restored the death penalty in 1901, provided that it should never be used where the accused is convicted on purely circumstantial evidence:" Raymond T. Bye, *Capital Punishment in the United States*, A Thesis Presented in Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy: Committee on Philanthropic Labor, 1919, 106 pages (AMS Press, Inc.: 1983).

[404] (1850), 5 Cush 295 at 312 (Mass. Sup. Ct.). The report of this trial is also referred to (without reference to this quotation) at: Report of the trial of Professor John Webster, indicted for the murder of Dr. George Parkman: www.law.du.edu/sterling; Chief Justice Shaw's direction on this particular point was reproduced by Borchard, *supra.*, footnote 2 at page 368.

> The advantages [of circumstantial evidence] are that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which, they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions; a source of error not existing in the consideration of positive evidence.[405]

Earlier in this paper, I outlined the role that predisposing circumstances can have in fostering a miscarriage of justice. Few cases exemplify that proposition better than the prosecution of Dr. Sam Sheppard, where a paper-thin circumstantial case of sensational proportions whipped a frenzied public and media into a mood bent on conviction.

Sheppard was convicted at trial in 1954. His conviction was affirmed by the Court of Appeals,[406] and the Ohio Supreme Court.[407] The Supreme Court of the United States denied *certiorari* on the original application for review.[408]

On July 4, 1954 Marilyn Sheppard, the accused's pregnant wife, was bludgeoned to death in the upstairs bedroom in their home in suburban Cleveland, Ohio. The case against Sheppard was entirely circumstantial. Sheppard claimed that after dinner, he dozed off and fell asleep on a couch downstairs. Several hours later, he heard his wife cry out. He rushed upstairs, and saw a form standing next to his wife's bed. He struggled with the "form", was struck and fell unconscious. On regaining his senses, he rose, saw his wife, took her pulse, and "felt that she was gone." He hurried downstairs, saw a form, and pursued it. He once again grappled with it, and again lost consciousness. On his recovery, he called a neighbour (the local mayor) who came over immediately. The neighbour asked, "What happened?" Sheppard replied, in an apparent daze: "I don't know, but someone ought to try to do something for Marilyn." Police were called immediately.[409]

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[405] This decision is still commonly cited in the United States: *Commonwealth v Riley* (January 25, 2001, per Ireland, J. for a five-person panel of the Supreme Judicial Court in Massachusetts: www.socialaw.com/sjcslip/8283.html

[406] 100 Ohio App. 345.

[407] 165 Ohio St. 293.

[408] 352 U.S. 910 (1956).

[409] These facts have been taken from the later decision of the United States Supreme Court: *Sheppard v Maxwell*, 384 U.S. 333 (1966), at page 336-7.

From the outset, officials focused suspicion on Sheppard. Through repeated and lengthy interrogations, investigators sought, unsuccessfully, to obtain a confession from him. Asked to take a lie detector test, Sheppard said that he would if it were reliable. He made himself available for questioning without the presence of counsel.[410]

Within days, police, prosecutors and the media went on the attack. An assistant prosecutor sharply criticized the refusal of the Sheppard family to permit his immediate questioning. From then on, headline stories repeatedly stressed Sheppard's lack of co-operation with police. Media said he had refused to take a lie detector test. Newspapers played up "the protective ring" thrown up by his family.[411]

Within two weeks, an "editorial artillery" opened fire with a front page charge that somebody was "getting away with murder."[412] A newspaper demanded an inquest, and one was called that same day. The inquest, held the following day in a school gym, was packed with reporters and photographers. Sheppard was questioned about a number of things, including whether he had had an affair with a woman named Susan Hayes. Given the circus-like atmosphere, he not surprisingly denied the suggestion.[413]

Public and media pressure intensified even further. Newspaper reports indicated that the police chief "urged Sheppard's arrest." They also emphasized his love affair with Susan Hayes, and contended that he had been involved with a number of other women.[414]

A newspaper article published three weeks after the killing demanded that Sheppard be taken to police headquarters. It used language that could only serve to inflame the public:[415]

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[410] *Ibid.* at 337-8.

[411] *Ibid.* at pages 337-9.

[412] *Ibid.* at page 339.

[413] *Ibid.* at page 340 [Ms Hayes was later called as a prosecution witness at the trial. She confirmed that she had had an intimate relationship with Sheppard: *The State of Ohio v Sam Sheppard* – October 18, 1954: http://www.law.umkc.edu/faculty/projects/ftrials/sheppard/1954TrialAccount.htm

[414] *Ibid.* at pages 340-1.

[415] *Ibid.* at page 341.

> Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases...

Within hours of a front-page editorial headlined "Why isn't Sam Sheppard in jail"? he was arrested. The media barrage further intensified, with headlines such as "New murder evidence is found, police claim," and "Dr. Sam faces quiz at jail on Marilyn's fear of him." The Supreme Court later noted that the newspaper clippings of the case filled five volumes, with similar coverage by both radio and television.[416]

The trial started on October 18, 1954. The courtroom was filled with media, and special overfill rooms were set up for the media elsewhere in the courthouse. Members of the public could only attend the trial with special passes issued for the purpose.[417]

The trial lasted nine weeks. The media were in a feeding frenzy. Lawyers, the judge and the jury were photographed and featured in the media almost every day. Witness' testimony was printed verbatim in local newspapers. The names and addresses of each juror were published, and each became a bit of a local celebrity. Media headlines claimed: defence jury tampering; Sheppard was guilty because he had hired a well-known defence attorney; Sheppard had fathered an illegitimate child with a female inmate in New York City, and, significantly, during Sheppard's own testimony before the jury, a police officer issued a press statement calling Sheppard a "bare-faced liar."[418]

Against that sort of backdrop, it is difficult to see how anyone could possibly receive a fair trial. On completion of the evidence, the jury deliberated for five days (an almost unprecedented length for that era), then found Sheppard guilty of second-degree murder. Subsequent appeals to the Supreme Court of the United States confirmed his conviction, although *en route* the Ohio Supreme Court said this:[419]

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[416] *Ibid.* at page 342.

[417] *Ibid.* at pages 343-4.

[418] *Ibid.* at page 349.

[419] *Ibid.* at page 356 (this was quoted by the Supreme Court in the first decision, and then was adopted by the Supreme Court in the second).

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre...In this atmosphere of a "Roman holiday" for the news media, Sam Sheppard stood trial for his life."

Ten years later, Sheppard again petitioned the Supreme Court of United States, this time successfully. On behalf of the Court, Mr. Justice Clark found that Sheppard had not received a fair trial because the "carnival atmosphere"[420] that had pervaded this trial had not been controlled by the trial judge. He added: "every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public."[421] A new trial was ordered, and this time Sheppard was acquitted.[422]

There is an important post-script to this saga. Seventeen days after the verdict of guilty at the original trial in 1954, Sheppard's mother committed suicide. She put a shotgun to her head. Eleven days later, Sheppard's father died. Over the next two decades, the case spawned a number of books, and formed the basis for the television series and movie "The Fugitive." In the late 1960s, after his release from jail, Sheppard became a severe alcoholic, and in 1970, at the age of 46, he died of liver failure. In 1989, Sam Sheppard Jr., who as a child had slept through the murder, started speaking out about the injustice done to his father. In 1995, he sued on behalf of his father for wrongful imprisonment, and alleged that one Richard Eberling (a former window washer for the Sheppards) was the real killer. Eberling was a career criminal who, five years after the murder, was arrested in possession of two of the deceased's wedding rings. Eberling was convicted of another murder in 1989, and in 1997 DNA tests confirmed that the blood at the crime scene matched that of Eberling. The following year, Eberling died, without confessing any sort of involvement to authorities. Despite all of this, on April 12, 2000 a jury rejected Sam Sheppard Jr.'s damage claim for the wrongful imprisonment of his father after a ten-week civil trial.[423]

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[420] *Ibid.* at page 358.

[421] *Ibid.* at page 356.

[422] "Lawyer: new DNA tests point to killer in Sheppard case", www.cnn.com/us/9803/05/sheppard.case/

[423] "The Dr. Sam Sheppard Case": Webmaster@samsheppard.com; ""Fugitive" still under cloud": abcnews.go.com/sections/us; "Sam Sheppard": www.who2.com/samsheppard.html [good links]; *The State of Ohio v Sam Sheppard* – October 18, 1954:

What do we learn from this incredible saga? By any account, the case was very weak, and entirely circumstantial. In the end, though, it was propped up by a media campaign that published extraneous, prejudicial information of dubious reliability. The public (and, probably, at least some of the jury) had been whipped into a frenzy. An innocent victim had been brutally murdered, and someone had to pay. Sam Sheppard had cheated on his wife, and had been caught lying about it. The evidentiary vacuum in the case was filled in by public indignation; it was truly an example of the power of a "town without pity."[424]

Part IV: Post Exoneration Reviews

Cases of wrongful conviction are invariably rooted in systemic failures, and it is not a coincidence that the same systemic problems have emerged with regularity in many different legal systems throughout the world. The pattern is clearly disconcerting.

The systemic problems are not confined to what goes on in the courtroom. They encompass the environment in which the case emerged and was viewed by the public, as well as the dynamics between, and philosophy of, the key players in the local legal milieu.

The *immediate* systemic failures can derive from virtually every step in the process – from the initial gathering of evidence, interviewing of witnesses, and identification of suspects; to decisions about which persons should be investigated; what scientific assistance to use; what evidence should be disclosed to the defence; to the principles surrounding the admissibility of evidence such as eyewitness identification, and the testimony of jailhouse informants; through to the availability and standards for post-conviction review.

It is important to remember that wrongful convictions often represent a triple failure of justice: an innocent person is wronged, a guilty person is allowed to go free without accounting to the public, and the victim's family must come to grips with the fact the person they loathed so long as the perpetrator of the crime is not, in fact, responsible.[425] Reforms in this area therefore require an evaluation not

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www.law.umkc.edu/faculty/projects/ftrials/sheppard/1954TrialAccount.htm; "Jury Trials and the Media": http://www.crfc.org/americanjury/jury_media.html [links to the two Supreme Court decisions]

[424] My apologies to songwriters Dimitri Tiomkin and Ned Washington, and, of course, Gene Pitney.

[425] Dianne L. Martin, *supra.*, footnote 176 at page 77; Keith A. Findley, *supra.*, footnote 2 at pages 337-338. (contending a "double failure")

only of what contributes to wrongful convictions, but also how those problems led in turn to a failure to identify and convict guilty parties. In this context, reform has two principal goals: reduce the risk of convicting the innocent, without, at the same time, imperiling the public interest through a multiplicity of rules that merely impede effective law enforcement.[426]

Until about 15 years ago, the principal debate in this area was whether a wrongful conviction had, in fact, taken place in a given case. And when error was found, the cases were usually dismissed as anomalies rather than symptoms of systemic flaws.

That has changed dramatically with the emergence of DNA typing as a forensic tool. Post-conviction, DNA has been used to exonerate more than 153 persons in the United States and Canada, and the number continues to rise.[427]

The three key questions now are: How did this miscarriage of justice occur? Are there systemic issues at play? How can we reduce the risk that wrongful convictions will happen again?

There are several vehicles that can be used to address these questions. They carry varying price tags; have differing degrees of transparency; and some have a statutory base, while others do not. But they are all available to government to avoid the specter of convicting the innocent.

i. *Public Commissions of Inquiry*: Easily the most transparent, and the most expensive.[428] This type of inquiry can examine a specific case in the context of broader, systemic issues (as in Canada); or *start* from a broad social issue (e.g. the death penalty), and move into specific cases (as in the United States). It can also focus sharply on a specific case, assessing the causes in that case only (as in Australia and New Zealand). The fully public model invites open hearings, testimony, cross-examination and a report that government commits in advance to release publicly. The work of such

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[426] A similar conclusion was reached by Michael J. Saks et al, *Model Prevention and Remedy of Erroneous Convictions Act*, 33 Ariz. St. L. J. 665 (2001), at page 677. And see *R v Ward* [1993] 2 All E.R. 577 (C.A.).

[427] For an update on DNA exonerations, see the Innocence Project in the United States, aligned with Association in Defence of the Wrongfully Convicted in Canada, at: www.innocenceproject.org (last visited on November 28, 2004).

[428] Both the Morin and Sophonow public inquiries cost approximately $5 million (Cdn.), exclusive of the compensation award.

commissions is three-fold: investigative, advisory to government and educational to the public.[429]

ii. *Private, Judicial Reviews*: This model involves a judge, or panel of judges or other eminent persons, reviewing a case on one of the bases described above. Usually, it does not have coercive powers such as the ability to subpoena witnesses or documents, and it need not have a legislative basis.

It has the advantage of being focused and speedy, and generally contains costs more than the public model described above. It lacks full transparency, and for that reason is open to criticism. That can be mitigated by appointing a person to head the review whose integrity is beyond question, coupled with an advance commitment to release the final report to the public.

iii. *Hybrid Models*: Review models exist between these two extremes. A review can begin privately, and then move into a public format, with coercive powers, should they become necessary.

iv. *Innocence Commissions*: These have also been proposed in the United States. After exoneration, a commission could examine the failings that caused a miscarriage, though they need not "muster the fortitude to engage in the type of painful (and expensive) individual case self-scrutiny the Canadians have undertaken in the Morin and Sophonow inquiries."[430]

v. *Forensic Evidence Audits*: Where wrongful convictions have occurred, and a causal pattern is discernable, government may wish, on its own initiative, to commence an audit of previous cases to ensure that there are no further wrongful convictions due to the same cause. This is particularly suited to a review of previously accepted scientific evidence, which has now been placed in doubt by DNA typing.[431]

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[429] Two further public inquiries are pending in Canada at the moment: *supra.*, footnote 148.

[430] Keith A. Findley, *supra.*, footnote 2 at page 351; *Toward the Formation of "Innocence Commissions" in America*, by Barry C. Scheck and Peter J. Neufeld, 86 *Judicature* 98 (2002). For discussion of *pre-exoneration* "Innocence Commissions" proposed for the U.S., see: David Horan, *The Innocence Commission: An Independent Review Board for Wrongful Convictions*, 20 N. Ill. U.L. Rev. 91 (2000)

[431] The Government of Manitoba established a Forensic Evidence Review Committee to examine the role that microscopic hair comparison evidence has played in homicide prosecutions during the past 15 years. The mandate of this Committee was to assess whether evidence of this nature may have contributed to any wrongful convictions in the Province of Manitoba. The mandate and results of the Committee can be found at www.gov.mb.ca/justice/index.shtml.

vi. *An Apology*: While this does not fit into the category of "post-exoneration reviews," government may wish to consider issuing an apology to the person wrongfully convicted. An apology goes well beyond a simple reversal of the conviction or the granting of a pardon: it publicly confirms that something went wrong in the case, and that the accused ought never to have been convicted in the first place. In the case of Thomas Sophonow, the Attorney General of Manitoba issued the following formal apology:

> On the 12th of March 1982 you were arrested and charged with the murder of Barbara Gayle Stoppel in Winnipeg, Manitoba. Subsequent legal proceedings led to your imprisonment for almost four years, although the court system ultimately acquitted you of the offence. A recent police investigation has demonstrated that you were in no way involved in this crime, and a review of that police investigation by my department supports that conclusion.
>
> You were arrested, charged and imprisoned for a crime that you had not committed. I cannot begin to even understand the anguish that you must have felt as you were going through this process. I wish, therefore, to extend to you, on behalf of the Province of Manitoba, my full and unqualified apology for your imprisonment under these circumstances, as well as the lengthy struggle you subsequently endured to clear your name.[432]

Part V: Where do we go from here?

In this essay, I have endeavored to emphasize three points. First, past and recent research into the causes of wrongful convictions has established clear patterns and trends that cut across diverse legal, political and social environments in Canada, the United Kingdom, Australia, New Zealand and the United States. We know, therefore, what the immediate causes are. There are, however, environmental or "predisposing" circumstances that allow those immediate causes to arise and affect a case. I think it is a mistake to focus only on the immediate causes without examining the environment that allows them to arise in the first place.

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[432] See, also, the apology provided by Prime Minister Tony Blair in the case of the Guildford Four: *supra.*, footnote 64.

Until we are able to ensure that public pressures and intense media assaults on a case do not contaminate the trial process, we will continue to see immediate causes (such as police induced false confessions and the suppression of exculpatory evidence from disclosure) arising and obstructing the truth-seeking process. Likewise, predisposing circumstances such as the development of a "game" approach to the adversarial system and philosophies such as noble cause corruption will, if left unchecked, continue to plague the criminal justice system and permit wrongful convictions to occur.

Second, while there is a continuing need to conduct some form of post-mortem once a wrongful conviction has been detected, it is far from clear that we need to undertake extensive and expensive reviews which merely confirm that well-known causes have prompted a miscarriage of justice in a particular case. Put simply, the causes are well established. Our energies should now be directed to the eradication of those causes by changing the way we investigate, prosecute, defend and try criminal cases.

Finally, there exists a need to develop long term strategies in this area. If we are going to successfully reduce the frequency of wrongful convictions, we need to consider and research a series of difficult public policy issues. Most are resource intensive, and will be difficult to undertake. Over time, however, research on these issues will provide us with a much better understanding of the broad legal, social and public forces that prompt juries to arrive at a wrong conclusion. They include:

a) What role should truth-seeking play in a criminal justice system? Is it an essential element of a fair trial? Has truth-seeking become undervalued in our trial process, and how do we reconcile it as a goal of the criminal justice system with the constitutional, evidentiary and procedural protections that are intended to safeguard against convicting the innocent?

b) Does the frequency of wrongful convictions vary between legal systems? If so, what variables contribute to those differences (e.g., adversarial vs inquisitorial; cultural differences; etc.)?

c) What mechanism is best suited to uncovering the systemic forces that have led to a wrongful conviction?

d) Is there a relationship between public perceptions that judges are either soft or tough on crime and the manner in which juries evaluate the issue of guilt or innocence in individual cases? In particular, do perceptions of "softness" increase the frequency of wrongful convictions?

e) Are there new ways to provide assistance to juries on issues of fact, without engaging in the proverbial "battle of witnesses", and without resorting to unreliable scientific techniques? Is it feasible to establish a cross-jurisdictional, multi-disciplinary roundtable to develop ideas?

f) Is it accurate to say, as some have argued, that prosecutors make decisions "rapidly and intuitively", with little previous training and with little sense of the need for consistency and some degree of transparency in the decision making process?

g) Do current good-faith police investigation practices raise an unnecessary risk of witness contamination and wrongful conviction? If so, in what fashion, and what changes should be made?

h) Have police services developed an unhealthy over-reliance on criminal informants that extends well beyond the simple provision of investigative tips?

Although the issue of wrongful conviction is often portrayed as a "liberal" issue focusing on the rights of an accused person, it is very much an issue that affects public safety and confidence in the justice system. Every time we convict someone of an offence for which they are innocent, the justice system fails in three ways. Along with the direct impacts on the person who is wrongfully convicted, the actual perpetrator remains free to continue victimizing others. Equally disconcerting, we re-victimize the victim or the family of the victim by undoing the emotional closure that has already taken place, and reopening a wound which, with an increasingly cold evidentiary trail, may never be healed.